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COUNCIL AND COURT OF THE UNITED NATIONS

THE end of actual fighting, the highly destructive effects of the war coupled with the future possibilities of the newly invented atomic bomb, and the wide publicity given to the recently established United Nations Organisation, have focused public interest on society's main problem—namely, the preservation of peace. It is in line with man's longing for an enduring peace that his ardent hopes are directed toward the United Nations.

Obviously, neither a State constituted by its own national legal order, nor the international community established in accordance with the norms of the international legal order, can give an *absolute* guarantee of peace. The fact that the doctrine *pacta sunt servanda* is universally accepted as the basis of all conventional law cannot be interpreted as an unlimited assurance that this axiom will never be violated. Within the restrictions set by human desires and propensities it is quite possible, however, to examine the meaning and significance of the United Nations Charter in connection with the avowed purpose of the United Nations, namely, ' to save succeeding generations from the scourge of war '.[1]

It would be a mistake to underestimate the role which the General Assembly can play in the pacific settlement of disputes. In spite of the fact that this organ of the United Nations will lack the power of enforcement, it can offer all nations an international forum in which to voice their agreements as well as their differences. This much-belittled ' glorified debating society ' may well become the most effective instrument in the strengthening of peace. It will be necessary, however, to turn to the Security Council and the International Court of Justice once the ' discussions ', ' considerations ', or ' recommendations ' of the General Assembly should not have produced the desired effects.

While the promotion of international understanding will

[1] Charter of the United Nations together with the Statute of the International Court of Justice, Preamble, in Department of State, Publication 2353, Conference Series 74, p. 1.

mainly be within the competence of the General Assembly, it is certain that the task of maintaining the peace—and that includes the element of force—will be reserved only to the Security Council and the Court of the United Nations. The cardinal question, therefore, is: Can the international lawyer, prepared to base his answer on a legal interpretation of the United Nations Charter, consider its relevant stipulations as adequate and effective with regard to the maintenance of peace and security?

In this connection, it should be noted at the outset that the Preamble of the United Nations Charter solemnly emphasises the determination of the 'Peoples of the United Nations . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . '.[2] A similar statement can be found in Article 1 of the Charter which refers specifically to the adjustment or settlement of international disputes 'in conformity with the principles of justice and international law'.[3] It is obvious that the framers of the United Nations Charter did not intend to base the relations between States solely on the rules of positive international law since they included, apparently as equally valid, the precepts of justice; and it is not by mere accident that the term 'justice' is given precedence to the term 'law', since the centre of gravity with regard to decisions concerning the enforcement of peace will be the Security Council and not the International Court of Justice. The Security Council as a political body, however, will mainly apply 'justice' while reserving the administration of international law to the International Court of Justice.

Justice and law may be considered as expressions related to norms of social orders which try to induce man to either behave in a socially desirable way, or to abstain from acts considered as socially undesirable. If defined in this sense it is quite possible that both justice and law can produce the anticipated effects. They are not necessarily incompatible with each other. The fact that the United Nations Charter mentions *justice* quite separately from *law* permits, however, the interpretation that the former and international law must not always be considered as synonymous terms; and there is little doubt that if and when 'justice' should come in conflict with 'law' the Security Council will be empowered to apply the former, namely, justice.

[2] *Ibid.*, Preamble.
[3] *Ibid.*, Chapter I, 'Purposes and Principles', Art. 1, s. 1.

Unfortunately, there exists no universal understanding as to the exact meaning of the term ' justice ', since this expression refers to subjective moral standards which differ not only with individuals but also with space and time. What is believed to be ' reasonable and just ' by one person, in a certain place and at a certain time, may very well be rejected by another individual as ' unreasonable and unjust '. In the absence of a general agreement concerning its meaning and substance it would be erroneous and highly confusing to consider ' justice ' as an ascertainable and applicable part of positive international law. Justice, once a dispute between States has arisen, is nearly always claimed to be on the side of each one of the disputants; and it is nearly always used for the *justification* of political claims which cannot be supported by existing rules of positive international law. Applied with regard to the powers of the Security Council, justice can certainly mean that governments, if they choose to do so, may reserve to themselves the ' sovereign right ' to base some of their decisions or actions not on the existing norms of international law but on considerations of political expediency. If this interpretation is correct, one would be constrained to admit the possibility that future relations between States, when conducted along notions of justice, might well come in sharp contrast with one of the main purposes of the United Nations, namely the maintenance of international security.

In contradistinction to the moral or political elements of justice, positive law—national as well as international law—is based on the objective standards of a coercive social order, the rules of which are more easily ascertainable in modern society since Courts or other constitutionally authorised agencies can impartially decide whether or not a claim is based on existing law. If understood in this sense, the application of law will not be based on the uncertain and ever-shifting notions of political expediency. It will advance peace and security far better than justice.

It is quite possible—in fact, it is very likely—that a decision of the Security Council as to whether or not a dispute constitutes a ' threat to the peace, breach of the peace, or act of aggression ',[4] will be made solely in accordance with notions of justice, *i.e.*, political expediency, rather than in conformity with the norms of positive law; and it is certainly conceivable that a political agreement reached by the Security Council could

[4] *Ibid.*, Art. 39.

be in flagrant violation of existing rules of international law. Since Article 39 of the United Nations Charter can be invoked at any time if an affirmative vote of seven, including, of course, the permanent members of the Security Council, can be reached, it may be feared that future relations between States will be based rather on political power than on law. It should be noted in this connection that once a political agreement under Article 39 has been reached, the Security Council may apply economic and military sanctions in accordance with the provisions of Articles 41 and 42.[5] There is good reason to believe that political considerations might, at some time or another, induce the Security Council to disregard the possibilities of judicial settlement by the International Court of Justice, even if one or more parties to a dispute should be prepared to accept the competence of the Court. In order to avoid the jurisdiction of the International Court of Justice it will only be necessary for the Security Council to invoke Article 39. Instead of declaring that ' the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security ' as provided for in Article 37, and by so doing to open the way to judicial settlement, the Security Council can, at any time, decide that a dispute constitutes a ' threat to the peace '. Such a course, however, is bound to undermine the most primitive foundations of security and confidence, without which peace cannot endure.

The distinction between justice and law has also been applied very consistently with regard to the jurisdiction of the International Court of Justice. The United Nations Charter stipulates that only ' legal disputes should as a general rule be referred by the parties to the International Court of Justice. . . . ' [6] A careful examination of the foregoing provision will reveal that so-called ' political disputes ', *i.e.*, disputes based on notions of ' justice ' rather than of law, are *ipso facto* excluded from the jurisdiction of the Court. Unless the governments at variance agree to submit to the Court the preliminary question whether or not their dispute is a legal one, and therefore within the jurisdictional competence of the Court, the power to make this fundamental decision will rest with the disputant governments themselves. If deductions from past experience are permissible, it is very unlikely to expect that governments will permit contentious questions of vital national interest to be classified as ' legal disputes '. The differentiation

[5] *Ibid.*
[6] *Ibid.*, Art. 36, s. 3.

between 'legal' and 'political' disputes, however, is detrimental to the application of objective standards in the relations between States, since it will—in nearly all circumstances—favour the country that has violated international law, or intends to do so in the future. It is exactly by declaring a dispute a 'political' one, and by withdrawing it therefore from the jurisdiction of an impartial Court bound to administer the rules of positive law—it is exactly by such an attitude that the notion of international security can be destroyed, since such an act is likely to favour the international wrongdoer, and to shatter the faith of nations in the only existing objective standard of 'justice' applicable to all, namely, law. It is true that the United Nations Charter does not bar States from concluding specific treaties, by which they agree to submit to the compulsory jurisdiction of the International Court of Justice both legal as well as political disputes; but one may consider it as unlikely that governments, and especially those of the larger States, will avail themselves of these opportunities. Hence, one is constrained to admit that the differentiation between legal and political disputes will greatly reduce the importance of the proposed Court as an effective organ for the pacific settlement of international disputes.

It remains, then, to determine whether the International Court of Justice will be given the undisputed right of jurisdiction in the much narrower domain of so-called 'legal' disputes. It is, however, certain that even with respect to 'legal' disputes the Court will lack compulsory jurisdiction. In order to appreciate the far-reaching emasculation of the Court's competence, it is only necessary to analyse the statute of this 'principal judicial organ of the United Nations'[7] in connection with Chapter VI of the United Nations Charter, dealing with the 'Pacific Settlement of Disputes'.[8] It is stipulated there that States having failed to settle a dispute peacefully by means of their own choice shall refer it to the Security Council,[9] which in turn shall decide whether or not the continuance of the dispute in question is, in fact, likely to endanger the maintenance of international peace and security.[10] While it is true that decisions under Chapter VI will be facilitated by the stipulation of the Charter, which prevents from voting any party to a dispute, even if it should be a permanent Member of the

[7] *Ibid.*, 'Statute of the International Court of Justice', Art. 1.
[8] *Ibid.*, Arts. 33–38.
[9] *Ibid.*, Art. 37, s. 1.
[10] *Ibid.*, Art. 37, s. 2.

Security Council, it is not certain that an affirmative vote of seven members will be reached in every case. Without such a vote no decision of the Security Council is possible. It should be remembered, however, that actions or recommendations in accordance with the provisions of Article 37, section 2, are conditioned by a previous declaration of the Security Council that the continuance of a specific dispute is, in fact, likely to endanger the maintenance of international peace and security. It is to be noted that even if such a preliminary agreement among seven nations represented in the Security Council can be reached, the latter is not bound to ' recommend ' that ' legal ' disputes should be settled by the International Court of Justice, since any other action considered appropriate for the settlement of the dispute may be suggested.

It is, of course, feasible to base a more optimistic appraisal of the Court's future role on the hope that governments will ' recognise as compulsory *ipso facto* and without special agreement ' [11] the jurisdiction of the Court in all legal disputes concerning :—

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.[12]

Such agreements were concluded by a great number of States before this war.[13] It would be erroneous, however, to speak with respect to the so-called ' Optional Clause ' and the special agreements based thereon, of a ' compulsory jurisdiction ' in the true sense of the term, since ' political ' disputes are not within the competence of the Court. The text of the various agreements concluded before this war with respect to compulsory jurisdiction of ' legal ' disputes, furthermore, indicate that many States then restricted the already limited jurisdiction of the Permanent Court of International Justice by additional reservations.[14] It is doubtful whether governments will be inclined to give the International Court of Justice wider powers of jurisdiction than they were disposed to grant its great predecessor, the Permanent Court of International Justice.

[11] *Ibid.*, ' Statute of the International Court of Justice ', Art. 36, s. 2.
[12] *Ibid.*
[13] Manley O. Hudson, *The World Court, 1921–1938*, Boston, 1938, pp. 30–31.
[14] Hudson, *op. cit.*, pp. 32–57.

The foregoing will reveal that it is quite possible to by-pass the International Court of Justice, even in the case of a so-called legal dispute. This interpretation is in full accord with the principles of the United Nations Charter, which declares 'justice' an equal partner of 'international law'. It is true, however, that Article 37, section 2, of the United Nations Charter confers upon the Security Council the right to take action in conformity with the stipulations of Article 36, section 3, permitting the Security Council to 'take into *consideration** that legal disputes should *as a general rule** be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court'.[15] Obviously, this section contains no mandatory provisions; on the contrary, it does not exclude the possibility that a dispute, even if agreed by the parties to be a legal one, will not be referred to the Court if, for *considerations** of an extra-legal nature, it should be regarded as more expedient to submit the matter to the Security Council. Such action may well be encouraged by the provision that legal disputes are to be submitted to the Court only 'as a general rule', a stipulation which, as it appears, permits any number of exceptions from this 'general rule' if a government or a majority of States in the Security Council should find it politically desirable to withhold a dispute from the jurisdiction of the Court.

It is quite possible, however, to assume that a certain number of legal disputes will be decided by the International Court of Justice.[16] What, then, are the provisions for the execution of the Court's verdict? No answer to this vital question can be found in the Statute of the Court. But Article 94, section 2, of the United Nations Charter provides for recourse to the Security Council should a party to a case fail to execute the Court's judgment; and it is stipulated that the Security Council 'may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.[17] The foregoing provisions clearly indicate that the Security Council is not legally bound to take any

* Italics mine.

[15] *Ibid.*, Art. 36, s. 3.

[16] It is in this connection of no importance that the Members of the United Nations may entrust 'the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'. (Art. 95 of the United Nations Charter.)

[17] *Ibid.*, Art. 94, s. 2, which states, 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

action. If, however, certain members of the Security Council should be willing to support the execution of the Court's verdict, they will be able to make recommendations or decisions only if an affirmative vote of seven members, including the concurring votes of the permanent members, can be reached.

He who is inclined to base his hopes for such an agreement upon the kindness of fate, or the unlimited wisdom of statesmen, may well be encouraged in his virile optimism. The political scientist, however, whose task it is to examine the role of the International Court of Justice only in accordance with the provisions of its statute, will be unable to participate in such excursions. Under these circumstances it would seem difficult to maintain that the newly created Court will play, even with respect to 'legal' disputes, an important role in the promotion or maintenance of international peace unless this 'principal judicial organ' of the United Nations will be fully supported by its principal political organ, namely, the Security Council; or—to put it differently—there won't be law without justice.

F. B. Schick.

THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945

Thus
Was justice ever ridiculed in Rome:
Such be the double verdicts favoured here
Which send away both parties to a suit
Nor puffed up nor cast down—for each a crumb
Of right, for neither of them the whole loaf.
(*The Ring and the Book*, ii, 747—752).

Thus Robert Browning: and from his lines we may perhaps gather what he would have thought of the Law Reform (Contributory Negligence) Act, 1945. But then, Browning was not a lawyer, or he could not have supposed that one party to a suit must necessarily be wholly in the right and the other wholly in the wrong. The new Act endeavours to reflect in terms of legal result the fact that in the world as we know it damage may be caused by the fault of both parties. It thus relieves the hardship caused by the common-law rule under which one of two negligent parties might emerge from the accident penniless while the other went unscathed. Even if nature left the loss equally distributed between the parties, the result of the last-opportunity rule at common law might be to pile the whole upon one of them; and perhaps the Act remedies this too. The advantage of the Act is not only that it enables the loss to be apportioned in accordance with ordinary ideas of fairness, but also that, by rendering possible the division of loss between two pairs of shoulders, it makes the loss in appropriate cases easier to be borne.

The present note will fall into two parts. It will first discuss the question whether the Act has delivered us from the last-opportunity rule, and will then make some specific comments upon the wording of the Act.

I

In general terms the object of the Act is to enable the Judge in cases of contributory negligence to apportion the damages between the parties according to the respective degrees of responsibility for the damage. Thus if either sues

the other he will get such damages as are attributable to the other party's portion of the responsibility.

A simple illustration will make this clear. Suppose that A and B are involved in an accident, through the negligence of both, and A suffers £500 damage while B suffers £100 worth of damage. It is held that A's responsibility for the damage amounts to four-fifths and B's to one-fifth of the total, that is to say, that A's responsibility is four times that of B's. Then A will recover from B one-fifth of his damages, amounting to £100, and B will recover from A four-fifths of his damages, amounting to £80. Thus on balance B will owe A £20 in respect of damages. Reviewing the situation, and leaving costs out of account,[1] it will be seen that A suffers his original £500 damage less the £20 received from B, = £480, while B suffers his original £100 damage plus the sum of £20 paid to A, = £120. Thus A's loss is four times that of B, which reflects the Court's assessment of the responsibility for the situation.

In cases where the Court cannot assess the degrees of responsibility—cases of ' inscrutable fault '—there will probably be equal apportionment.

The operative provision of the Act is in the first part of section 1 (1), which runs as follows :—

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

The construction of this provision is a matter of some difficulty, chiefly on account of the state of the common law before the Act. It is proposed to examine the common law very briefly in order to explain how the difficulty arises.

The general principle of the common law established by *Butterfield* v. *Forrester* (1809)[2] was that if the damage was caused by the fault of both parties, neither could recover from the other. ' In the place where the tree falleth, there it shall be.' This may be called for convenience the stalemate rule, because it resulted in a drawn game.

[1] See as to costs *Jay & Son* v. *Veevers, Ltd.*, [1946] 1 All E.R. 646.
[2] 11 East 60.

The stalemate rule worked hardship where one of the two negligent parties had sustained the whole of the loss although his negligence was not the major cause of the accident. Accordingly the rule was modified by a second rule, known as the doctrine of last opportunity—in the United States as the doctrine of the last clear chance and in Canada as the doctrine of ultimate negligence—under which the plaintiff was allowed to recover, notwithstanding his own negligence, if upon the occasion of the accident the defendant could have avoided the damage while the plaintiff could not. This rule is usually attributed to *Davies* v. *Mann* (1842),[3] though it had been laid down four years before, in rather careless language, in *Bridge* v. *Grand Junction Ry.* (1838).[4] In course of time it came to be modified in certain ways, particularly by the doctrine of *Loach's Case*[5]; indeed, it seems that *Loach's Case*, on one interpretation, wholly supersedes the last-opportunity rule in favour of a rule of 'greater fault'.[6] In the following discussion we shall let these complications pass, and the rule will be considered as a rule of last opportunity and nothing else.

As we have seen, the last-opportunity rule was designed to mitigate the hardship of the stalemate rule, and it needed no justification other than that. But unfortunately, in order to relate it to existing legal principles Judges sometimes spoke as though it rested on the law of causation or remoteness of damage. Thus Lord Denman, in his dissenting judgment in the Exchequer Chamber in *Radley* v. *London and North Western Ry.* (1875),[7] said: 'I think it was quite open to contend that the plaintiffs, through their servants, were guilty of negligence in leaving that wagon unattended during so long a time as they did, but it . . . was not negligence which in any sense caused the accident . . . [The cause of the accident] was entirely the affirmative act of the defendants' servants, in charging the bridge as they did.' Regarded as a proposition of fact (that is to say, interpreting the word 'cause' in its ordinary popular and scientific sense) this is untrue. It will be remembered that in *Radley's Case* the facts were that the servants of the plaintiffs, whom we will designate by the symbol N1—indicating that they were

[3] 10 M. & W. 546.
[4] 3 M. & W. 244.
[5] [1916] 1 A.C. 719.
[6] M. M. MacIntyre, 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665. Nevertheless Lord Sumner, in *Loach's Case* (at p. 727), said that 'the question is not one of desert or the lack of it, but of the cause legally responsible for the injury'.
[7] L.R. 10 Ex. at 108–9.

responsible for the first act of negligence,—had left a broken truck upon another truck, the combined height of the two trucks being greater than that of the plaintiff's bridge over the line. An engine driver employed by the defendants, whom we will call N2, had negligently forced the combined trucks against the bridge and broken it. On such facts it is simply untrue to say that the negligence—*i.e.*, the negligent act—of N1 was not 'in any sense' a cause of the accident. But for that act the accident would never have happened, and the act was therefore, at the very least, a *causa sine qua non*. Causation in its wide sense implies what has been well called a cone of causation receding back in time, and clearly N1's act of negligence fell within this cone. However, it is not all causes that are regarded by the law, and what Lord Denman must have meant is that N1's act was not a cause for legal purposes, or, as the point may better be expressed, was too remote a cause in law. It was too remote because N2 had the last opportunity of avoiding the accident. On this view, the last-opportunity rule becomes a branch of the law of causation or remoteness. On appeal to the House of Lords, however, although the decision of the Court below was reversed and the net effect of Lord Denman's dissenting judgment was affirmed, his reference to causation was not repeated. Lord Penzance, who delivered the only full speech, contented himself with saying that 'though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him'.[8] It will be seen that this language merely states a rule of law, without reference to causation, under which the plaintiff is allowed to recover.

Many cases after *Radley's Case* base the last-opportunity rule on a theory of causation, but in none of them (except possibly certain Admiralty and Privy Council cases, to be noticed later) was the legal basis of the rule directly in issue, so that all these pronouncements may be regarded as *obiter*. Perhaps the strongest *dictum* is that of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1940).[9] Lord Atkin used the causation theory to justify the conclusion that the defence of contributory negligence applied to actions for breach of statutory duty. 'I find it impossible', he said 'to divorce

[8] (1876), 1 App.Cas. 754 at 759.
[9] [1940] A.C. 152 at 164–5.

any theory of contributory negligence from the concept of causation.' The actual decision is, however, capable of being supported without reference to this theory. It may perhaps be added, with the utmost respect, that Lord Atkin's analysis of the situation hardly shows that very learned Judge's usual acuteness. Thus he declared that the negligence of the plaintiff in *Butterfield* v. *Forrester* was the sole cause of the accident that happened. This it obviously was not. Indeed, nothing in nature has a sole cause. If in *Butterfield* v. *Forrester* the defendant had not negligently left the pole across the road, no injury would have been sustained by the plaintiff. The defendant's negligence was therefore a factor contributing to the accident. Causation, in the ordinary meaning of the term, is not the same either as the legal rules of remoteness of damage or as the legal doctrine of last opportunity.

We may now consider the bearing of the new Act upon the common-law position. The combined result of the stalemate rule and the last-opportunity rule at common law may be stated in three propositions.

(1) Where neither plaintiff nor defendant had the last opportunity of avoiding the accident, the plaintiff fails. (It will be remembered that refinements on the doctrine of last opportunity, such as the rule in *Loach's Case*, are here being omitted for the sake of simplicity. They form part and parcel of what is here compendiously described as the last-opportunity rule.)

(2) Where the plaintiff had the last opportunity of avoiding the accident, the plaintiff fails.

These two propositions represent the residue of the stalemate rule after deducting the last-opportunity rule. The last-opportunity rule yields the third proposition.

(3) Where the defendant had the last opportunity of avoiding the accident, the plaintiff recovers the whole of his damages.

As regards the application of the present Act, it is clear that it applies to case (1), and that in this case the loss may be apportioned.

It is submitted that the Act also applies to case (2). The only doubt in the way of this conclusion is the theory that the doctrine of last opportunity is an application of the rules of causation or remoteness of damage. It is obvious that the rules of causation and remoteness continue to apply, and if

the last-opportunity rule is a part of the law of causation or remoteness, then it must continue to apply also. However, it is submitted that the last-opportunity rule is a distinct rule, and that as applied in case (2) it must now be regarded as abolished by the Act. This submission will be further argued after dealing with case (3).

The view may be taken that, although the Act applies as a matter of theory to case (2), the Court should not in case (2) award the plaintiff any part of his damage, but should in the exercise of its discretion dismiss the action. Admittedly there may be situations where this would be the just course. At the same time, it is conceived that it cannot be laid down as an invariable rule that merely because the plaintiff had or ought to have had the last opportunity of avoiding the accident, he is to be deprived of compensation in respect of any part of his damage. For instance, suppose that N1 is driving at a grossly excessive speed down a crowded street. N2, fearing that an accident may happen and in order to try to make N1 slow up, deliberately stands in his path and holds up his hand, meaning to jump out of the way if necessary at the last moment. He fails to jump in time and is injured. On such facts it may be found that N2 had the last opportunity of avoiding the accident and negligently failed to take it; yet a Judge may well regard the case as one requiring an apportionment of N2's damage.

Turning to case (3), it is submitted that the Act also applies here; and consequently that the plaintiff no longer has a right to the whole of his damages, as he had at common law, but is subject to have them abated at the discretion of the Court. This time there are two difficulties in the way of the submission.

The first difficulty results from the same view as that just considered. If it is true that the last-opportunity rule is a branch of the law of causation or remoteness, it follows that where the last opportunity is with the defendant, any contributory negligence on the part of the plaintiff is in law too remote a causal factor of the damage. Hence the situation is not one where, in the words of the sub-section, a 'person suffers damage as the result partly of his own fault'. Although the plaintiff may have been at fault, his fault has to be ignored because it is too remote.

As before, it is submitted that this view is incorrect, and that the fact that the defendant had or ought to have the

last opportunity does not in itself make the plaintiff's fault too remote a causal factor.

The second difficulty arises from the wording of the sub-section itself. The sub-section enacts that a claim 'shall not be defeated by reason of the fault of the person suffering the damage . . .'. These particular words fail to provide for the case under consideration, and are applicable only to cases of types (1) and (2). In case (3) the situation at common law was not that the claim of the plaintiff was defeated but that he recovered in full. Hence, had the sub-section stopped with the above words, it could not have been contended that it covered cases of type (3).

However, we have to see whether the case is comprised in the concluding words. The concluding words are: 'but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.' Now it must be admitted that some sort of case can be made out for saying that even these words do not help the defendant. The words follow on those previously quoted, and may possibly be regarded as applying only to the case where at common law the plaintiff would have failed—*i.e.*, only to cases (1) and (2). However, such an interpretation would be unfortunate, because the resulting rule would be quite irrational. The rule as to last opportunity in case (3) was developed in order to mitigate the injustice that would otherwise have resulted from an application of the rule that in cases of contributory negligence the loss lies where it falls. Now that the latter rule has been modified by the new statutory provision, there is every reason for applying the new statutory provision to case (3) and no reason for continuing to throw the whole loss on the defendant.

The lopsided result that would follow from applying the Act to case (2) and not to case (3) may be illustrated by an example. N1, driving a taxicab, negligently collides with N2, driving a lorry. N2 has the last opportunity of avoiding the accident, and each party suffers damage. In an action by N1 for damages, N2 counterclaims for damage to the lorry. On N2's counterclaim it is found that N1 was one-fifth responsible and N2 four-fifths; thus N2 recovers from N1 one-fifth of his damages. If on N1's claim it is held that the apportionment rule of the Act does not apply, it follows that N2 cannot claim an abatement of one-fifth but must pay N1 the whole of N1's damages. It is submitted that there would be no

reason for such a distinction between the parties. If such a distinction were admitted it would mean that, notwithstanding the Court's assessment of the degrees of responsibility, the losses ultimately borne by the parties would depend to some extent on the way in which they happened to fall. The object of the Act would thus be defeated.

The desirable view can be obtained from the wording of the sub-section by regarding the concluding words as an independent enactment and not as merely consequential on the words 'a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage'. In other words, the section should be interpreted, for the purpose of case (3), as though the words just quoted were omitted, and as though it provided simply that, in all cases where damage is caused by the fault of both plaintiff and defendant, 'the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.

In an earlier part of this discussion it was indicated that we should have to deal in more detail with the contention that the last-opportunity rule is an application of the law of causation or remoteness. It is now proposed to illustrate by examples what is or should be meant by causation, remoteness and last opportunity, in order to show the distinctions between them.

(1) *Causation.* The meaning of the word 'cause' in the following discussion may be defined as follows. If a fact E would not have occurred but for the occurrence of an antecedent fact C, then C is said to be a cause of E, and E is said to be the effect of C.[10] Every event has a number of causes, and each of these causes in turn has a number of causes, so that, as already said, every event is the result of a cone of causation stretching back in time.

In determining whether damage has been caused by the negligence of the defendant it is necessary to determine whether it has been caused by that feature of the defendant's conduct which is held to be negligent. For instance: D is driving a vehicle without keeping a proper look-out. P,

[10] It may happen that either of two causes, C_1 or C_2, could produce an effect E. Strictly speaking the above definition should be modified to provide for this type of case. It should run: 'If a fact E would not have occurred but for occurrence of an antecedent fact C_1, or would have occurred without the antecedent occurrence of C_1, only if C_1 had been replaced by another fact C_2, then C_1 is said to be a cause of E.'

driving negligently, collides with him. The facts are such that even if D had been keeping a proper look-out he could not have avoided P, and the accident would have happened just the same. Here D's driving the vehicle is a cause of the accident, for had he not been at that spot at that time the accident would not have happened. But D's negligent failure to keep a proper look-out is not a cause of the accident. Therefore there is no negligence on the part of D causing the accident and an action by P against D must fail.

As we have already seen, there is a persistent confusion in the cases between causation on the one hand and remoteness or contributory negligence on the other, but it is submitted that the questions ought to be kept separate.

(2) *Remoteness of damage.* The mere fact that D's negligence caused the accident does not make D liable, for the negligence may in law be too remote a cause, or, to use an alternative expression, may be not sufficiently proximate. The best example of this is the 'exhaustion of danger' principle. D negligently collides with P and P is injured. When being taken to hospital, P is again injured by the negligence of another driver, X, the second accident having nothing to do with the first accident except in the sense that but for the first accident P would not have been at the particular spot at the particular time and so would not have been involved in the second accident. Here D's initial negligence is a cause of P's second injury, for but for that negligence the second injury would not have been sustained. But it is too remote a cause to be considered by the law, and thus D is not liable for the second injury.

It is obvious that this conclusion as to remoteness is independent of any question of contributory negligence between the parties. It may have been that P was guilty of contributory negligence at the time of the original accident. But irrespective of the question of contributory negligence, D escapes liability on the ground of remoteness of damage.

In the above illustration the application of the law of remoteness gives a fair result; but it is submitted that remoteness is usually out of place in collision cases (which are the usual cases of contributory negligence), where both parties are at fault. Where A and B collide through the negligence of both, it will very rarely happen that the negligence of either A or B will be too remote a cause of the damage. Whether A or B has the last opportunity of avoiding the accident for the purpose of the common law of

contributory negligence is an altogether different question, as we shall now see.

(3) *Last opportunity.* Notwithstanding all that Judges have said as to the last-opportunity doctrine being a branch of the doctrines of causation or remoteness, the overwhelming weight of argument is that this is not so. The distinction between last opportunity and remoteness is best shown by taking a case involving three actors.

Consider the following hypothetical case. N1, who is subject to epileptic fits, illegally and negligently undertakes to drive a lorry. He is seized with a fit when driving and collides with N2, driving a taxi, who has the last opportunity of avoiding the accident and negligently fails to take it. P, a pedestrian, happens to be at the point of impact of the two vehicles and is injured. It is submitted that P is entitled to recover not only from N2 but from N1. N1 was guilty of gross negligence in driving a lorry when he suffered from epileptic fits, and the (perhaps slight) negligence of N2 in failing to use due care to avoid the accident when the accident was imminent, though a last opportunity as between N1 and N2 for the purpose of the common law of contributory negligence, is not a sufficient *novus actus interveniens* to make N1's negligence too remote a cause of the damage. If this is so it is evident that the law of last opportunity is not the same as the law of remoteness of damage. In the case put, N1 had not the last opportunity of avoiding the accident, yet his negligence is not too remote a cause of the accident. For the purpose of the law of remoteness his negligence is a 'proximate' cause; for the purpose of the law of contributory negligence it is not. 'Proximate cause' is therefore an ambiguous phrase, bearing one meaning in the law of remoteness and another in the law of contributory negligence. The fact that the same phrase can be used in the two branches of the law gives them the appearance of being the same, but the case just put shows that they are not.

There seems to be no English case unequivocally supporting the conclusion drawn from the hypothetical problem put above. The cases rejecting the doctrine of identification—cases like *The Bernina*[11]; *Oliver* v. *Birmingham Omnibus Co.*,[12] and the Irish case of *Wellwood* v. *King*[13]—are very

[11] (1888), 13 App.Cas. 1.
[12] [1933] 1 K.B. 35.
[13] [1921] 2 Ir.R. 274. See as to these cases MacIntyre, 'The Rationale of Imputed Negligence' (1944), 5 U. of Toronto L.J. 368.

nearly in point, for they all allow a plaintiff to recover notwithstanding any question of contributory negligence between the defendant and a third party. However, it is not clear that in any of these cases the third party had the last opportunity of avoiding the accident. The best support that can be derived from these cases for the argument here advanced is this, that the cases do not regard the question of last opportunity between the two tortfeasors as material to the issue. Had it been regarded as material it would have been discussed.

Two Canadian cases are more specific. In *Canadian Pacific Ry.* v. *Smith* (1921)[14] a train belonging to the appellant railway company (N1) was approaching a crossing without giving the statutory warning. The respondents were father (N2) and daughter (X), and N2 was driving X in his car towards the crossing. N2 negligently crossed the track without looking for the approaching train, and there was a collision. It was held by the Supreme Court of Canada, first, that N2 could not recover from N1, because he was guilty of contributory negligence. It seems clear that N2 had the last opportunity of avoiding the accident[15] (though as between N1 and N2 this was immaterial, because mere contributory negligence on the part of N2 sufficed under the stalemate rule to exclude his recovery[16]). Notwithstanding this, it was held that X, who was not identified with her father, could recover against N1.

The second case is *Topping* v. *Oshawa Street Ry.* (1931).[17] The driver of a motor-truck (N1) through negligent driving stalled his truck on the rails of an oncoming street-car. The driver of the street-car (N2) negligently failed to apply his brakes soon enough, and an impact took place in which X, a passenger in the street-car, was injured. It was held by the Appellate Division that X was entitled to succeed against N1, as well as against N2. Riddell J.A. pointed out that X must in such a case show that N1's negligence caused the accident (which is obvious), and also that N1's negligence

[14] 62 Can.S.C.R. 134.

[15] Mignault J. said: 'It is true that . . . the engine did not whistle. . . . But notwithstanding this negligence of the company, had the plaintiff been reasonably careful he would have seen the train in time, and the fact that the statutory warnings were not given cannot . . . excuse him in rushing with his eyes open to his own destruction' (at p. 151).

[16] The case arose before the passing of the Canadian Contributory Negligence Acts.

[17] 66 Ont.L.Rev. 618. Both this and the last case are cited by MacIntyre in (1940), 53 H.L.R. at 1235, reprinted in (1940), 18 Can.B.Rev. at 674.

was a *causa causans*, not a *causa sine qua non* (which is debatable). Probably what the learned Judge meant was that the negligence must not be too remote a cause. He proceeded to hold that it was an effective cause, but unfortunately cited *Loach's Case* [18] as an authority for this proposition. *Loach's Case* turned on contributory negligence, not on remoteness, so that to cite it on a question of remoteness is apt to cause misunderstanding. However, the decision reached is satisfactory.

In cases like these the Tortfeasors Act [19] clearly allows contribution or indemnity between N1 and N2, as regards the damages that either of them has to pay X. Suppose that N1 is made liable for X's damages in the first instance, and that as between themselves N1 and N2 are found equally responsible. Then, under the Tortfeasors Act, N1 recovers from N2 half the damages that he has had to pay X. This being so, it would be anomalous in the extreme to refuse to apply the Contributory Negligence Act in respect of loss suffered by N1 and N2 personally. Suppose that N2 has suffered by far the greater personal loss: would it not be most unfair to operate the Tortfeasors Act against him, thus compelling him to contribute a half of the damages paid by N1, while refusing to operate the Contributory Negligence Act in his favour, thus leaving him to bear alone the whole of his personal loss?

The greatest impediment to a correct appreciation of the difference between last opportunity and remoteness lies in that branch of the law of remoteness referred to as *novus actus interveniens*. The impression is easily created that where one party has the last opportunity of avoiding the accident, his negligent failure to take it is necessarily a *novus actus* which makes the first party's negligence too remote a cause. It is submitted that a study of the cases on *novus actus interveniens* shows that this is not so. The conclusion reached in Salmond's *Torts*, where the cases are carefully considered, is that a *novus actus* does not make the damage too remote where it was foreseeable.[20] Now in the ordinary collision case, where N1 is guilty of the first act of negligence, it is usually true to say that when N1 created the dangerous situation he ought to have foreseen that the situation might be aggravated by the mistakes of other persons, even by

[18] [1916] 1 A.C. 719.
[19] A more convenient name for this purpose than that by which it was christened —the Law Reform (Married Women and Tortfeasors) Act, 1935.
[20] 10th ed. (ed. Stallybrass) 137 ff., particularly at 144.

their negligent mistakes. Therefore the negligent mistake of another does not make the damage too remote. This is precisely the conclusion in *The Eurymedon*,[21] though there it is presented in terms of contributory negligence, instead of, as it is submitted it should be, in terms of remoteness of damage. Similar reasoning applies to the statutory duty to fence dangerous places and machinery. The main reason for this statutory duty is that if the place or machinery is not fenced, people who use it may make a negligent mistake and incur serious injury. There would be little need to fence dangerous places and machinery if everyone going near them were perfectly careful. It follows that in an action for statutory negligence in failing to fence, it cannot be regarded as making the plaintiff's damage too remote that his conduct at the time of the accident was careless. The duty is imposed for the very purpose of guarding people against the consequences of their own carelessness, and to regard the plaintiff's carelessness as making the damage too remote would tend to nullify the object of the statutory provisions. It is true that the Courts did tend to nullify the object of the statutory provisions by holding contributory negligence to be a defence in actions for breach of a statutory duty to fence, but it is submitted that with the passing of the Contributory Negligence Act these decisions ought to be regarded as superseded by the statutory scheme of apportionment.

It is further submitted that with the passing of the Tortfeasors Act and the Contributory Negligence Act the Courts ought to be more reluctant than they were formerly to declare that negligent conduct is too remote a cause of damage. The facility with which Judges have sometimes applied the law of remoteness in the past has perhaps been due in some measure to the absence of a rule allowing contribution and indemnity between joint tortfeasors. Where N1 was guilty of the first act of negligence, and N2 of a later act of negligence, and the two negligences combined caused damage to X, the Court was sometimes reluctant to make N1 liable to X, and the reason may have been that if they did so N1 would have no right of contribution against N2, although as between N1 and N2 the latter's share of the responsibility might seem to be greater. Thus it may have been the absence from the legal system of the present Tortfeasors Act that was partially responsible for some decisions on *novus actus interveniens*, just as it was the absence from

[21] [1938] P. 41.

the law of the present Contributory Negligence Act that brought about the rule of last opportunity. Now that apportionment is possible in cases of contributory negligence it is necessary to drop the rule of last opportunity, and now that contribution and indemnity are possible between joint tortfeasors it is necessary to modify the rules as to *novus actus interveniens*. Otherwise the scope of both Acts will be unduly diminished. With the passing of these Acts there is no occasion to distinguish between remoteness caused by a *novus actus interveniens* and remoteness brought about in other ways, and the law ought to be in all cases that damage is not too remote if foreseeable in kind. The adoption of this rule and the suppression of the real or supposed peculiarities of *novus actus interveniens* would effect a great simplification in the law of remoteness of damage.

Two other differences between contributory negligence and remoteness of damage may now be mentioned, by way of further support for the view that they are not applications of the same doctrine. These two differences are, however, merely of technical interest, and too much emphasis should not be placed on them.

(1) It seems that in modern law contributory negligence must be specially pleaded, whereas remoteness of damage can be argued under the general issue. This rule was assumed by Scrutton L.J. in *Bottomley* v. *Bannister* (1932).[22] But as to the first half of the rule, under the old system of pleading even contributory negligence could be raised under the general issue.[23]

(2) The question of remoteness of damage is entirely one of law for the Judge, so that if he thinks that on balance the damage was too remote, he must give judgment for the defendant.[24] But the issue of contributory negligence is primarily one for the jury, though if the undisputed evidence shows that the only rational inference is that there was contributory negligence, the Judge must direct the jury to find for the defendant.[25]

The passing of the Contributory Negligence Act makes it very important that the distinction between last opportunity and remoteness of damage should be recognised. The last-

[22] [1932] 1 K.B. 458 at 482–3. Cp. as to the first half of the rule *per* Lord FitzGerald in *Wakelin* v. *L. & S. W. Ry.* (1886), 12 App.Cas. 41 at 51–2; *Owners of S.S. Pleiades* v. *Page*, [1891] A.C. 259; R. S. C. Ord. 19, r. 15.
[23] *Per* Lord Fitzgerald in *Wakelin's Case* (last note).
[24] So Winfield, *Textbook of the Law of Tort*, 3rd ed., § 21.
[25] *Sharpe* v. *Southern Ry.*, [1925] 2 K.B. 311.

opportunity rule was a modification of the stalemate rule, and was brought into being in consequence of the failure of the common law to apply an equitable rule of apportionment. Would it not be unfortunate if we were compelled to continue the rule of last opportunity when we now have a statutory power of apportionment? Again, the statute was passed partly in order to simplify the law of contributory negligence. If the last-opportunity rule survives there will be no simplification but only further complexity.

Notwithstanding these arguments there is grave danger of the Courts whittling down the Contributory Negligence Act by refusing to apply it to cases of last opportunity. The danger comes not merely from the *obiter dicta* already considered but also from four other sources: the views expressed by text-writers, the analogy of Admiralty cases, the authority of Privy Council and Canadian cases, and the views of the Law Revision Committee.

(1) *The views of text-writers.* The theory that contributory negligence is a branch of the law of causation is adopted by Dr. Stallybrass in his edition of Salmond on *Torts.*[26] In consequence he takes the view that the last-opportunity rule is not abrogated by the Act, though he thinks that the power to apportion damages will probably tempt the Courts to ignore it in practice.[27] So also Professor Winfield considers that the causation theory is on the whole the most satisfactory, but he doubts whether it is a complete explanation.[28] The submission here made, on the other hand, is that the last-opportunity rule is simply a very imperfect attempt to give legal effect to what is usually the greater negligence of the party with the last opportunity; it is an attempt to do rough justice, and need not be stated as a branch of any other department of legal doctrine. Bohlen came more or less to this conclusion in the year 1908,[29] and it has been reinforced by a valuable article by Mr. MacIntyre in 1940.[30]

(2) *The analogy of Admiralty cases.* The original rule in Admiralty cases was that where a collision occurred through the negligence of both parties, the loss was divided equally.

[26] 10th ed. 451.
[27] *Ibid.* viii—xi, 457.
[28] *Textbook of the Law of Tort*, 3rd ed. 405.
[29] 'Contributory Negligence' (1908), 21 H.L.R. 233; reprinted in Bohlen, *Studies in the Law of Torts*, 500.
[30] 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665.

This rule was sufficiently fair in its working to render unnecessary any doctrine of last opportunity. However, the doctrine of last opportunity worked its way into Admiralty cases. It was first applied by the common-law Courts in cases involving collisions between ships in territorial waters. After the Judicature Act, under which appeals could be taken from the Admiralty Division of the High Court to the Court of Appeal and House of Lords, manned by common-law lawyers, it came to be applied to Admiralty cases proper.[31] As Mr. MacIntyre puts it, 'it was but natural that these appellate Courts, bewitched by the unanalysed multiguity of the word "cause", should apply those common-law doctrines with which they, and the lawyers practising before them, were most familiar. What they failed to realise was that last clear chance was fashioned to alleviate the harshness of another common-law rule unknown to Admiralty'.[32]

A further qualification upon the original Admiralty rule was introduced by the Maritime Conventions Act, 1911, which enabled the Court of Admiralty to apportion damages according to degrees of fault. The Act applied to the cases 'where, by the fault of two or more vessels, damage or loss is *caused* to one or more of those vessels', etc.; and accordingly the House of Lords held in 1924 that the last-opportunity rule survived under the Act, as part and parcel of the legal concept of causation.[33] All that can be said about this regrettable decision is that it is perhaps not absolutely conclusive,[34] and that the House of Lords may, if it so wishes, succeed in evading it by the same subtle blend of distinguishing and ignoring as was used in the *Fibrosa Case*[35] for evading the *French Marine Case*.[36] But what is needed, it is submitted, is that the House should have the authority to overrule a decision so clearly erroneous. Alternatively the matter could be set right by legislation. A

[31] *Spaight* v. *Tedcastle* (1881), 6 App.Cas. 217, *per* Lord Selborne L.C. at 219; *Cayzer, Irvine & Co.* v. *Carron Co.* (1884), 9 App.Cas. 873.

[32] 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. at 1239, reprinted in (1940), 18 Can.B.Rev. at 678.

[33] *Anglo-Newfoundland Development Co.* v. *Pacific S. N. Co.*, [1924] A.C. 406.

[34] In the speeches of Lords Dunedin, Shaw and Blanesburgh it appears only as a second ground of decision, the first being that the defendant was not negligent. Lord Phillimore took the first ground, and possibly the second also by concurrence. Only Lord Atkinson based his judgment primarily upon the last-opportunity rule. It may thus conceivably be argued that the pronouncements upon the last-opportunity rule by the majority were *obiter*, or at any rate lacking in absolutely binding authority.

[35] [1943] A.C. 32.

[36] [1921] 2 A.C. 494. See *ante*, Vol. VI, pp. 47–8.

possible formula would be to enact that in applying the Maritime Conventions Act and in determining questions of causation as between two negligent parties the fact that the one had a later opportunity of avoiding the accident shall not destroy the conduct of the other as a legal and direct cause of the accident, unless such opportunity would be regarded as destroying such conduct as a legal and direct cause in civil proceedings between a third party and the person guilty of such conduct. In other words, in determining questions of remoteness as between N1 and N2, one has to picture a slight change of fact under which damage is caused not to N2 but to a third party, X. If on such changed facts N1's negligence would be regarded as too remote a cause of the damage, then it is equally too remote a cause of N2's damage. Otherwise it is in law a contributory factor and the Court has the power to apportion the damages. It is greatly to be regretted that either this formula or some other to the same effect was not introduced into the Contributory Negligence Act.

(3) *The authority of Privy Council and Canadian cases.* The Judges of Quebec, with their civil-law affiliations, were able to develop an apportionment rule in contributory negligence cases without the aid of statute. Although the doctrine met with opposition from appellate Courts, which were more familiar with common-law than with French authorities, it eventually won the day and practically excluded the doctrine of last opportunity. However, in 1915 a fresh champion of last opportunity arose in the person of the Privy Council. In *Canadian Pacific Ry.* v. *Fréchette*[37] an appeal was taken from the Quebec Courts to the Privy Council, and this body attempted to reintroduce the last-opportunity doctrine into Quebec law, holding in effect that apportionment was possible only in a case where neither plaintiff nor defendant had the last opportunity of avoiding the accident. In order to reach this conclusion it had to overrule all the Courts below. This ill-advised attempt to rivet the primitive rules of the common law upon the relatively more advanced civil-law system is said to have had little influence upon the practice of the Quebec Courts.[38] But there is little doubt that the decision

[37] [1915] A.C. 871.

[38] See MacIntyre in (1940), 53 H.L.R. at 1236–8, reprinted in (1940), 18 Can.B.Rev. at 675–7. *Contra*, MacDonald in (1935), 13 Can.B.Rev. 560, quoting Goldenberg, *The Law of Delicts under the Civil Code of Quebec* (1935).

will now be produced in English Courts as an authority upon the construction of the English Act.

The common-law Provinces of Canada started with the English rules of contributory negligence. Apportionment was first introduced by statute into the Province of Ontario [39] (significantly, the neighbour of Quebec), but from the start the Ontario Courts held that it applied only to cases of concurring negligence and not to cases where one party had the last opportunity.[40] Later, as a result of Conferences of the Commissioners on Uniformity of Legislation in Canada, a uniform law was drafted which was adopted, with some variations, in the Provinces of British Columbia,[41] Nova Scotia,[42] Brunswick,[43] Alberta,[44] and Prince Edward Island.[45] Again the Courts took the view that the doctrine of last opportunity was not excluded. The best-known case is *McLaughlin* v. *Long* (1927),[46] a decision of the Supreme Court of Canada under the New Brunswick Act. The facts were that the defendants' servant was in charge of and driving a motor truck from which he was delivering goods to customers. He allowed some boys to ride with him, and the plaintiff, a boy of ten, was standing on the running-board. The driver asked him to get off. The boy ignored this request, and the driver took no further steps to enforce it, but drove off while the boy was still on the running-board. Through the driver's negligent driving (which had nothing to do with the presence of the boy on the running-board) the car plunged off the road and the boy was injured. It was held that the boy was not guilty of contributory negligence and was entitled to recover in full. The Court cited two cases that have already been noticed by us: *Spaight* v. *Tedcastle* [47] (an analogous English

[39] The Contributory Negligence Act, 1924 (c. 32), substantially repeated in the Contributory Negligence Act, 1927 (c. 103); re-enacted in different form in the Negligence Act, 1930 (c. 27), amended in 1931 (c. 26) and 1935 (c. 46). The original Act was due to the initiative of Mr. M. J. Gorman K.C.: see articles by him in (1917), 37 C.L.T. 23, (1922), 42 C.L.T. 425; see also MacMurchy in (1923), 1 Can.B.Rev. 844, and note in (1924), 2 Can.B.Rev. 206.

[40] *Walker* v. *Forbes* (1925), 56 O.L.R. 532, [1925] 2 D.L.R. 725; *Mondor* v. *Luchini* (1925), 56 O.L.R. 576, [1925] 2 D.L.R. 746; *Farber* v. *Toronto Transportation Commission* (1925), 56 O.L.R. 537, [1925] 2 D.L.R. 729.

[41] Statutes, 1925, c. 8.

[42] Statutes, 1926, c. 3.

[43] R. S. N. B. (1927), c. 143. For the text of all these Acts up to 1936, see C. F. Davie, *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada* (Toronto, 1936) 279 ff.

[44] Statutes, 1937, c. 18.

[45] Statutes, 1938, c. 8.

[46] [1927] S.C.R. 303, [1927] 2 D.L.R. 186.

[47] Above n. 31.

case on the Admiralty rule) and *C. P. Ry.* v. *Fréchette*[48] (the Privy Council case on the Quebec law of *faute commune*).

The decision at first sight appears reasonable, because the negligent driving had nothing to do with the presence of the boy on the running-board. The fact that the car plunged off the road was undoubtedly due simply and solely to the negligence of the defendants' driver. However, the plunging of the car off the road was not in itself a tort to the boy. The action of negligence presupposes damage, and in order to decide the case one has to ask oneself whether the boy's act of standing on the running-board contributed to his own damage. This depends on the question whether he would have been injured had he been inside the car. If the driver had taken the car over a cliff, the negligence of the passenger in standing on the running-board would clearly not have been a factor contributing to his injury. On the facts as they occurred, however, it seems that the boy would have been safe had he been inside, and thus his negligence was a factor contributing to his injury. The question that then arises is whether the negligent driving on the part of the driver was a sufficient *novus actus interveniens* to make the boy's act of standing on the running-board too remote a cause of the damage. In order to answer this question correctly it is best to imagine that the action had been brought not by the boy himself but by a third party, thus getting rid of the element of contributory negligence and reducing the case purely to one of remoteness of damage. The requisite change can be made by imagining that the boy was wearing clothes belonging to a third party, that these clothes were damaged, and that the third party sued the boy for negligence. If on such facts the third party would fail, then the decision in *McLaughlin* v. *Long* is right, for then the boy's negligence would indeed be too remote a cause of his own injury. But if the third party would on such changed facts succeed in his action, the decision on the actual facts must be wrong. The way in which the particular question is answered is of no importance for the main theme of this paper, though it is submitted that on such altered facts the third party would succeed against the boy,[49] who would be regarded as a joint tortfeasor with the driver, and therefore that on its actual facts *McLaughlin* v. *Long* is wrong. Of course, to say that

[48] Above n. 37.
[49] Cp. *Burrows* v. *March Gas Co.* (1872), L.R. 7 Ex. 96.

it is wrongly decided as regards the principle at issue is not to say that the net result is wrong, for where the plaintiff's share in the accident is regarded as venial and the defendant's negligence is gross it should always be open to the Court in the exercise of its discretion to refrain from deducting any portion of the plaintiff's damages.

The perpetuation of the last-opportunity rule under the Canadian negligence statutes has been the subject of an ever-growing volume of criticism. Legislative amendment was advocated by Dean Falconbridge in 1927, for otherwise, he said, 'we do not seem to be much better off than before—we must first apply the old law, and compel the jurors to answer the old series of questions, which they probably do not understand, before we can decide whether the present statute applies at all, and then put another question to the jury in the event of the statute applying'.[50] This change of feeling may be reflected in certain decisions of the Canadian Courts, which, while not perhaps expressly disavowing the rule in *McLaughlin* v. *Long*, depart from the strictness of the common law as to last opportunity. In *Morgan* v. *British Columbia Electric Ry.* (1930)[51] the plaintiff parked his motor truck on a dark and rainy night in such a position that it was foul of the track of a street railway (*i.e.*, tramway). The defendant's motorman, driving a tramcar without keeping a proper look-out, collided with the truck. It was found as a fact that he would have seen the truck in time to stop his car if he had been keeping a proper look-out; yet notwithstanding this finding damages were apportioned by the British Columbia Court of Appeal. The striking thing is that Martin J.A. expressly held that the case was on all fours with *Davies* v. *Mann*; yet he concurred in the apportionment. Again, in *Irvine* v. *Metropolitan Transport Co.* (1933)[52] a situation occurred closely resembling that in *Tart* v. *Chitty*[53] and *Baker* v. *Longhurst*.[54] One dark and snowy night N1 left a motor truck standing on the highway, it being found as a fact that in the circumstances this was negligent. N2, driving too fast, collided with the truck. It was held that N2 was entitled to recover 25 per cent. of his damages from N1. On the face of it the case might seem to

[50] (1927), 5 Can.B.Rev. at 583–4.
[51] [1930] 4 D.L.R. 30, [1930] 2 W.W.R. 776, 42 B.C.R. 382.
[52] [1933] O.R. 823, [1933] 4 D.L.R. 682.
[53] [1933] 2 K.B. 453.
[54] [1933] 2 K.B. 461.

have been the same as *Butterfield* v. *Forrester* and *Davies* v. *Mann*; but it was held that the negligence of both parties continued up to the moment of the accident and that the plaintiff could accordingly recover under the Contributory Negligence Act. As in *The Eurymedon*,[55] the Court, knowing that if it fails to find a last opportunity it will be able to use the statutory power to apportion, is no longer so anxious to find a last opportunity as it was at common law. Indeed, Masten J.A. admitted this when he said that ' the Contributory Negligence Act has not abolished the doctrine of ultimate negligence but, in determining whether the plaintiff's negligence was contributory or ultimate, I think we are to be guided by the doctrines which the Maritime Courts have established respecting collisions of ships rather than by the doctrine of the common law '.

The former decision, namely that in *Morgan* v. *British Columbia Electric Ry.*, was criticised by two writers as an expression of the existing law,[56] though the first of these writers suggested legislative change on the ground that the instant decision approximated very closely to abstract justice and that the rule usually adopted ' works in many, if not in the majority of cases, a real injustice '. Of three more recent articles on the subject in the Canadian Bar Review, two attack the rule of last opportunity while only one suggests that it may be retained subject to modifications.[57] The matter has also been under consideration by the Conference of Commissioners on Uniformity of Legislation since 1928. At first, in 1928, the Commissioners decided that it was impossible to draft a measure to avoid an inquiry into last

[55] [1938] P. 1.

[56] I. S. Fairty in (1931), 9 Can.B.Rev. 52; J. A. Weir in *ibid.* 470.

[57] The two articles first referred to above are Robinette in (1933), 11 Can.B.Rev. at 90–1 and MacIntyre in (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665. The third is Vincent C. MacDonald in (1935), 13 Can.B.Rev. at 555–63. At p. 555 Mr. MacDonald admits that there is ' general dissatisfaction with the restricted scope of the Acts '.

A curious work on the Canadian legislation is C. F. Davie's *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada* (Toronto, 1936). This writer strongly supports the last-opportunity rule, believing it to be part of the legal concept of causation (he does not discuss the difficulty in the way of his view where an innocent plaintiff is suing one of two negligent tortfeasors). In consequence he believes that many cases in which the Canadian Courts have applied the apportionment legislation are wrongly decided. His discussion of the cases in which, as he thinks, the statutes were wrongly applied takes seventy-three pages, while the cases in which he thinks the statutes rightly applied are so few that they can be dismissed in eleven pages. It is clear that Mr. Davie's view would deprive the statutes of most of their remedial effect. For a critical review of the book (not, however, in respect of the last-opportunity rule), see (1936), 14 Can.B. Rev. 368; reply, *ibid.* 563.

opportunity, but in 1934 they adopted a compromise suggestion under which the Judge was to be directed by statute not to submit to the jury any question of last opportunity unless in his opinion there was evidence upon which the jury could reasonably find that the act of one party was clearly subsequent to and severable from the act of the other.[58] Such a legislative direction would, in England at any rate, have little positive effect, for it seems merely to state the law as laid down in *The Volute*[59] and *Swadling* v. *Cooper*.[60] Also, as an amelioration of the last-opportunity doctrine it is mainly confined to collision cases: it would have little application to contributory negligence in cases of breach of duty to fence dangerous places or machinery, for here the last opportunity of the employee is clear. The Commissioners' suggestion has, however, been adopted in the Contributory Negligence Acts of Alberta[61] and Prince Edward Island.[62]

(4) *The views of the Law Revision Committee.* The Law Revision Committee, in proposing the apportionment rule which has now been adopted by Parliament, did not overlook the relation of the new statutory scheme to the last-opportunity rule; they expressly considered it.[63] And the conclusion to which they came was that the last-opportunity rule should stand. The reasons for this important decision are given as follows.

(i) The last-opportunity rule is merely a rule of causation. It has already been submitted that this is a confusion of two separate principles of law.

(ii) Owing to their ability to apportion the blame the Judges of the Admiralty Court have not made the same 'meticulous analysis' of causes as the common-law Judges. The conclusion from this appears to be, though it is not expressly stated, that under the Contributory Negligence Act there will be a relaxation of previous common-law principles, even though they are not expressly abandoned. Just as, before the Act, Judges tried to say that the defendant had or should have had the last opportunity, if that conclusion achieved rough justice in the particular case, so, under the Act, Judges will try to deny that either party had or ought

[58] See (1935), 13 Can.B.Rev. 562.
[59] [1922] 1 A.C. 129.
[60] [1931] A.C. 1.
[61] Statutes, 1937, c. 18, ss. 5, 6.
[62] Statutes, 1938, c. 5, ss. 5, 6.
[63] Eighth Report (Contributory Negligence), Cmd. 6032 of 1939, pp. 16—17.

to have had the last opportunity, thus bringing the case within the common-law stalemate rule and so within the ambit of the Act. We have already seen that this has been the tendency in Canada. In so far as the Judges succeed in doing this the fact that the Act may not theoretically abolish the last-opportunity rule is of no practical effect.

Nevertheless it is submitted, with respect, that this is not a satisfactory way of leaving the matter. In the first place it leaves the new principles to be worked out at the cost of the parties in expensive litigation, instead of providing for them in the reformatory Act itself. The experience in Canada is enough to warn us of the volume of litigation that is likely to follow from this course. In the second place, with the doctrine of precedent, it leaves open the possibility that some cases on all fours with decided cases will be held to be governed by them.

This second difficulty arises particularly in certain types of case. Where the damage arises through a collision of two vehicles or ships the difficulty is not so acute, because it is frequently possible for the Courts in these cases to oust the last-opportunity rule by the 'separation of time, place or circumstance' rule in *The Volute*,[64] or by the 'negligent mistake' rule in *The Eurymedon*,[65] or even by an extension of the type of reasoning employed in *Loach's Case*.[66] In some other situations, however, this is quite impossible. For instance, where the collision occurs between a moving vehicle and a fixed obstruction, with negligence on both sides, it is often impossible for the Court to avoid applying the last-opportunity rule in the same way as it was applied in *Davies* v. *Mann*.[67] Take, again, cases on breach of statutory duty. The standard case is where the defendants have broken a statutory duty to fence a dangerous place or machine and the plaintiff, an employee, has been injured in consequence. In such circumstances the common-law position was as follows: (*a*) If the plaintiff was completely exonerated by the Court from the charge of negligence, as he was for example in *Caswell's Case*,[68] he recovered in full. (*b*) If the plaintiff was held to have been guilty of contributory negligence, as he was in *Dew* v. *United British Steam-*

[64] *Admiralty Comrs.* v. *S.S. Volute*, [1922] 1 A.C. 129.
[65] [1938] P. 41.
[66] *British Columbia Electric Ry.* v. *Loach*, [1916] 1 A.C. 719.
[67] (1842), 10 M. & W. 546.
[68] *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152.

ship Co.[69] and *Lewis* v. *Denye*,[70] he recovered nothing. (*a*) remains the same under the Act. As to (*b*), it is clear that the plaintiff in cases of this type had the last opportunity of avoiding the accident, and therefore, if the last-opportunity rule survives the statute, the Judges are still powerless to award the plaintiff any portion of his damages even under this remedial legislation. It is no use the Law Revision Committee suggesting that the Courts will be benevolent in determining causation under the new Act; this is a case where, if the last-opportunity rule survives, the Courts can do nothing.

A survival of the last-opportunity rule in this type of case would be particularly surprising for two reasons. In the first place, the case is one in which the greater share of the blame is likely to rest with the employer, who has exposed his employees to danger by neglecting to fence. At common law the Courts could give a remedy to the employee only by declaring that the employee's conduct at the time of the accident was not negligent at all, and this declaration was usually nothing more than a form of pious perjury to give the unfortunate employee a remedy. It would be regrettable if this straining of the law has to be continued under the present Act; and, of course, cases occur (like *Lewis* v. *Denye*) where even this straining is not possible. In the second place, a denial of a remedy under the new Act in this type of case would be surprising because the Act itself seems to contemplate that a remedy is given. Section 4 of the Act defines 'fault' as used in the Act to include a breach of statutory duty. The commonest case of breach of statutory duty is the failure to fence dangerous places, and in such circumstances any contributory negligence on the part of the plaintiff will invariably amount to a failure to take the last opportunity of avoiding the accident. It is difficult to imagine that Parliament intended this type of case to be excluded from the scope of the Act.

(iii) The next contention of the Law Revision Committee is that if the necessity for causation in the legal sense is abandoned, 'it is difficult to see to what matters the causes of an accident can be limited'. The answer to this argument is twofold. (*a*) Abandonment of the last-opportunity rule would still leave us with the law of causation proper and of

[69] (1928), 139 L.T. 628.
[70] [1940] A.C. 921.

remoteness. (*b*) Under an apportionment rule questions of causation and remoteness in respect of initial liability lose most, if not all, of their importance, for the slightness of causation or the remoteness of a cause can always be registered in a refusal of the tribunal to take the cause into consideration in the apportionment of responsibility.

(iv) Last, the Committee argues that to abandon the last-opportunity rule would involve the difficulty of either (*a*) altering the Admiralty rule also and for that purpose amending an Act that has been passed to give effect to an International Convention, or (*b*) making the common law again inconsistent with the Admiralty rule. This is perhaps the weakest argument of all. As to alternative (*a*), an alteration in the present Admiralty rule would, it is true, involve an alteration in the established interpretation of the Maritime Conventions Act. But it would not involve an alteration in the Act itself, and so would not be a violation of the Convention of Brussels. The Maritime Conventions Act says nothing of last opportunity, but speaks only of causation. An Act passed to make it clear that last opportunity is not the same as causation would not be an amendment of the Maritime Conventions Act, but would merely set right the mistaken interpretation of that Act. It would bring English law into line with civil-law systems, which in applying the law of *faute commune* do not regard a last opportunity as ousting the power to apportion,[71] and it would therefore further, not defeat, the purpose of the Convention of Brussels, which was to render uniform the law of the sea.[72] As to alternative (*b*), if it is a separate argument at all it must mean no less than this, that where one branch of the law is unsatisfactory, another branch that is the subject of legislative amendment must also be made unsatisfactory in order that both may be the same. It means that if the Committee is given the choice between having one department of the law perfect and another imperfect, and having both departments imperfect, it elects to have them both imperfect. Putting the matter in human terms, it means that if the Committee

[71] See F. P. Walton's criticism of the last-opportunity rule from the civil-law standpoint in (1933) 49 L.Q.R. 82–3.

[72] The origin of the Convention is interestingly described by Louis Franck in (1926) 42 L.Q.R. 25.

It may be added, if another argument is needed, that even if it were necessary to amend the treaty rules themselves, the Contributory Negligence Act would afford a precedent for doing so. S. 1 (7) amends the treaty rules enacted in the Carriage by Air Act, 1932.

have their way an unknown number of factory hands are in the future going to lose tort compensation for injuries suffered in part through their employers' grave breach of duty, and this for no better reason than that lawyers want to keep Admiralty and common-law rules the same.

As against the supposed advantages of the last-opportunity rule the Committee hardly sees one of the objections to it. True, it is recognised that the rule is 'at times' difficult and uncertain in its working, but this difficulty is explained away by saying that it is always the result of the complicated facts and not of the law. 'The events which lead up to an accident are often complicated, and the law which cannot take account of every cause must do its best to choose that which seems most consistent with what it regards as common sense and common fairness.' Assuming that this is what the common law did (which may be somewhat doubted [73]), it was indeed a sound enough rule, *given the initial premise of the common law that the damages could not be divided.* But it ought to be recognised that the search for *the single* cause of an accident was always illusory, and that now that the Judges can apportion damages even common sense and common fairness demand that we give it up.

Although a majority of the Committee consisted of present- or one-time teachers of law, no mention is made of the burden on teacher and student involved in perpetuating the hotchpot of decisions on last opportunity. At a time when the law is expanding in every direction and the burden on teacher and student becomes ever more onerous, the law lecturer is still to go on year after year reconciling or trying to reconcile *Loach's Case* with *Butterfield* v. *Forrester* and *The Eurymedon* with *Davies* v. *Mann.* Surely, even if only in the interests of those who have to learn the law, a cardinal aim of law reform ought to be simplification wherever possible.

It may be added that the teacher's lot is not the only unhappy one, for the difficulty of instructing a law student in the subtleties of last opportunity is as nothing to the difficulty of instructing a jury. Lord Atkin said:

[73] It will be recalled that in *Loach's Case*, [1916] A.C. at 727, Lord Sumner said: 'The question is not one of desert or the lack of it, but of the cause legally responsible for the injury.' Ignoring the second part of the statement the first part had a measure of truth: no amount of bad desert on the part of the defendant availed the plaintiff unless the defendant had or should have had the last opportunity. But the last-opportunity rule is itself an attempt to give legal expression to what is thought to be the defendant's bad desert.

> Nothing is more difficult than to direct a jury with regard to contributory negligence in an ordinary running down case and to apply the doctrine of *Davies* v. *Mann*.[74]

If the rule of last opportunity survives the new Act the difficulty will be increased, for now juries will have to be instructed not only on the law of last opportunity, where relevant, but also on the apportionment rules. As usual, Canadian cases point a moral in this respect. In one Canadian case a new trial had to be ordered where the jury, thoroughly muddled, had assessed the degrees of fault and then added that *both* parties had the *last* opportunity.[75]

In view of this rather depressing aspect of the Committee's recommendations one is glad that its report is not admissible in evidence. A Judge may know about the report, but if so he is entitled to keep his knowledge to himself. The report is therefore no legal hindrance to a decision that the last-opportunity rule has been abrogated by the Act.

It may be added in conclusion that the question here discussed is left open in the only case on the Act that has been reported at the moment of writing. This is *Jay & Sons* v. *Veevers, Ltd.* (1946),[76] where Lynskey J. mentioned that neither party had a last opportunity and proceeded to apportion the damages. The fact that the learned Judge thought fit to mention the question of last opportunity is some indication that in his view it was relevant. However, the question does not appear to have been argued.

More troublesome, perhaps, is the case of *Smith* v. *Bray* (1939),[77] where Hilbery J. held, on the similar wording of the Joint Tortfeasors Act, that the apportionment is to be on the basis of causation and not on the respective degrees of negligence of the parties. It is respectfully submitted that either this is a distinction without a difference or it is incorrect. It is true that the wording of the Act affords some ground for the decision by suddenly switching from the term 'fault' to the term 'responsibility', but it is submitted that 'responsibility' here means moral responsibility and therefore means the same as 'fault' in the

[74] (1925) Journal of the Society of Public Teachers of Law 14. See also O'Connor L.J. in (1922) 38 L.Q.R. 17.
[75] *James* v. *McLennan, McFeely and Prior, Ltd.*, [1941] 1 D.L.R. 555, noted (1941), 19 Can.B.Rev. 222; and cp. *Gives* v. *C. N. Ry.*, [1941] O.W.N. 376, noted *ibid.* 754.
[76] [1946] 1 All E.R. 648.
[77] 56 T.L.R. 200.

ordinary meaning of that word (not necessarily the same as 'fault' in the special meaning given to it by section 4 of the Contributory Negligence Act). If Hilbery J.'s view be right, it would seem to mean that in cases of concurrent negligence the loss must be divided equally, however great the degree of blame on one side and however small the degree of blame on the other side. It is difficult to believe that this is the correct interpretation of the Act.

II

The discussion of last opportunity has taken somewhat excessive space, and it is time to sketch the other provisions of the Act. The general apportionment rule in section 1 (1) is subject to a precautionary proviso which declares that it does not defeat any defence arising under a contract (*e.g.*, a contractual consent to run the risk of harm), and that the damages awarded must not exceed any maximum fixed by contract or enactment (*e.g.*, a maximum sum fixed in a workman's railway ticket, or the maximum provided in Article 22 (1) of the Convention in the Schedule to the Carriage by Air Act, 1932). Sub-sections (2) and (6) provide that the Court or jury shall determine the total damages that would have been recoverable if the claimant had not been at fault; this is to prevent the need for a new trial where the decision is varied on appeal. Another precautionary provision is sub-section (3), which makes the obvious point that if there are two or more defendants the provisions of the Tortfeasors Act shall apply between them. Sub-section (4) provides in effect that where an action is brought under the Fatal Accidents Acts the dependants are identified with the deceased for the purpose of the Contributory Negligence Act, so that the compensation they recover may be reduced under the Act. The provisions of the Act are also expressed to modify Article 21 of the Convention in the Schedule to the Carriage by Air Act, 1932.

Section 2 aroused much controversy during the passage of the Bill, and was considerably changed. It deals with the situation of a plaintiff who has the choice of bringing either a common-law claim against his employer or a claim for workmen's compensation. If he chooses to bring the common-law action, and the damages awarded to him are reduced under the Act on the ground of his contributory negligence, the result may show that it would have been

more to his advantage to claim under the Workmen's Compensation Act, where contributory negligence as such is not a defence. Accordingly section 2 of the Contributory Negligence Act provides that the plaintiff may in such a case ask the Court not to give him damages under this Act but instead to assess compensation under the Workmen's Compensation Act.

Section 3 excludes Admiralty cases from the scope of the Act, and also cases arising before the passing of the Act. Section 4 contains various definitions: in particular it defines 'damage' (in section 1 (1)) to include loss of life and personal injury, and it defines 'fault' to mean negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act, give rise to the defence of contributory negligence. The Act, therefore, applies to claims for breaches of strict statutory duty. Sections 5 and 6 provide for the application of the Act to Scotland and (if adopted) to Northern Ireland.

Two flaws in the drafting of the Act are worth notice.

(*a*) It will be remembered that section 1 (1) provides that 'where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons', the apportionment provision shall apply. There is a somewhat remarkable omission here for the case where damage is caused in part by the negligence of the plaintiff's servant. One would have expected to find, after the words 'his own fault', the words 'or the fault of a person for whom he is vicariously responsible'. It is well settled that in the law of contributory negligence a master is identified with his servant, a partner with his co-partner, and an employer with his independent contractor, to the extent that there is vicarious liability for these persons according to the general rules of the law of tort. If, therefore, a master brings an action in respect of damage to which his servant, acting in the course of the employment, negligently contributed, the master is liable to be met by the defence of contributory negligence to the same extent as if the action were brought by the servant. It cannot be supposed that the Act was intended to be silent on this matter, and thus presumably the words 'his own fault' will be read as including by implication the fault of one for whom the master is vicariously liable.

This interpretation is assisted by the recent case of *Twine*

v. *Bean's Express, Ltd.* (1946).[78] The facts there were that the driver of a van, contrary to instructions, allowed T. to travel in the van, T. knowing that he had no right to be there. Owing to the negligent driving of the driver, T. was killed. In an action by T.'s personal representatives against the employers of the driver, Uthwatt J. (as he then was) held that the employers were not liable. The reason given was that T. was a trespasser, the employers did not know of his presence on the van, and therefore the employers owed no duty towards T. The decision is of great interest on the theoretical foundation of vicarious liability. It seems to mean that vicarious liability does *not* rest on the attribution to the master of the servant's breach of duty. Had the latter view been taken in the instant case, then, since the driver was clearly liable to the plaintiff in negligence,[79] and since his negligent driving was apparently in the course of his employment, it would apparently have followed that his actionable negligence would have been imputed to the employers. Uthwatt J. rejected this view and held that the question was not whether the servant had broken his duty to the deceased but whether the employers had broken their own duty to the deceased. Vicarious liability meant that the *acts* of the servant were imputed to the employer, not that the *duty* of the servant was imputed to the employers. To quote Uthwatt J.'s words, 'the law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts. In determining the duty of the employer and the duty of the servant on any occasion, all the circumstances have to be considered. In the general run of cases, the duty of both is the same; but that is a coincidence, not a rule of law. The general question in an action against the employer, such as the present, is technically: "Did the employer in the circumstances which affected him owe a duty?"—for the law does not attribute to the employer the liability which attaches to the servant'. In the instant case, the acts of the servant did not constitute a breach of duty by the employers, because the employers themselves owed no duty to a trespasser of whose presence they were unaware. (Apparently the servant's knowledge of the trespasser's presence could not be imputed to the employers, because the servant was acting outside the

[78] [1946] 1 All E.R. 202.
[79] *Lewys* v. *Burnett*, [1945] 2 All E.R. 555.

course of his employment in respect of allowing the trespasser to be there at all.) If Uthwatt J.'s view is correct, and it is submitted that it is,[80] it enables the proper interpretation to be placed upon the present words of the Act. For, on Uthwatt J.'s view, where a servant does an act in the course of his employment, this act is, for the purpose of the law of tort, attributed to his master; and if the act falls within the statutory definition of 'fault' (*i.e.*, if it is an act that would, apart from the Act, give rise to the defence of contributory negligence), the act, being in law the master's act, is also in law the master's 'own fault' within the words of the sub-section. In any event, quite apart from technicalities, it is submitted that the Act ought to be interpreted in the light of its broad policy; and it cannot be inferred from the omission of reference to vicarious liability that the legislature intended to change the settled principle that vicarious liability, where it occurs, is treated in the same way as personal liability.

(*b*) The second hiatus in the Act occurs in section 5, the contents of which have not hitherto been given in this note. The sub-section provides as follows:

> Where, in any case to which sub-section (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act, 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said sub-section.

The sub-section is designed to avoid unfairness resulting from the lopsided working of statutes of limitation. It is, however, imperfect in not adding the words 'or his personal representative' after the words 'one of the persons at fault'. This may be seen by taking two illustrations.

[80] The view has the advantage of explaining how it is that a master may be vicariously liable in tort although the servant himself owed no duty to the plaintiff. For instance, a statute imposes upon a railway company the duty to provide gates at a level crossing. The company provides gates and a keeper, and the keeper carelessly fails to shut the gates. It seems possible that the keeper would not himself be liable to the member of the public who is injured, for the keeper possibly owes no duty to the public, but only to his employers. Thus the keeper has on this view committed no tort, and if vicarious liability means vicarious liability for the tort of the servant, the company cannot be liable. But actually it is liable (*North Eastern Ry.* v. *Wanless* (1874), L.R. 7 H.L. 12). This means that the law attends to the duty of the master, making the master liable for breach of the duty imposed on the master, and regarding the breach as occurring through the act of the servant.

(i) A, a civilian driver, collides with B, an army driver, by the fault of both. Twelve months after the accident A dies. His personal representatives bring an action against B in which B files a counterclaim, and by way of defence to A's claim pleads section 21 of the Limitation Act, 1939 (formerly the Public Authorities Protection Act, 1893). The present sub-section provides that if B succeeds in his defence under the Limitation Act, he must fail in his counterclaim under the Contributory Negligence Act. This is a fair result.

(ii) As before, save that it is B, not A, who dies. Twelve months after the accident A sues B's personal representatives, and they counterclaim and plead section 21 by way of defence. Read literally, the sub-section fails to provide for this case. It applies only where B avoids liability to A or A's representatives by the plea of the Limitation Act; it does not, on its terms, apply where B's personal representatives raise the plea. It is to be hoped that the Courts will regard B's personal representatives as sufficiently identified with him to be caught by the provision.

Glanville L. Williams.

REVIVAL OF CONDONED MATRIMONIAL OFFENCES

THE question of what conduct is necessary to revive a condoned matrimonial offence which has agitated the Divorce Courts in recent years has been recently settled by the decision of the Court of Appeal in *Beard* v. *Beard*,[1] where Scott and Lawrence, L.JJ. held, Vaisey J. dissenting, that condoned adultery was revived by desertion for less than three years, even though such desertion is not a ground for independent matrimonial relief. Despite the fact that the law must now be regarded as settled by this decision, it is interesting to examine some of the deeper grounds and implications of the Court of Appeal's decision. Before making this examination it may be as well to point out that the question at issue is not the restricted one posed by a learned writer in a recent article in this journal [2] of whether a condoned matrimonial offence will be revived by desertion for less than three years, but whether it can be revived by any conduct short of a matrimonial offence for which substantive relief can be granted in the Divorce Courts. This wider question embraces other forms of matrimonial misconduct such as cruelty, indecent or irregular conduct not constituting adultery, and less serious conduct such as failure to support.[3] There seems no doubt that the decision in *Beard* v. *Beard* carries with it an affirmative answer, though with certain reservations, to this wider question.

At the outset it must be pointed out that the public interest in matters of divorce which is so often referred to and relied on [4] involves at least two countervailing social interests, namely :—

(a) the necessity for the maintenance of stable family life and marriage as an institution; and

(b) the desirability of dissolving the marriage tie in cases where it would be futile to continue it.

These countervailing interests were expressly recognised by

[1] (1945), 61 T.L.R. 555.
[2] Rupert Cross, 'The Revival of a Matrimonial Offence by Subsequent Misconduct' (1945), 8 MOD.L.REV. 149.
[3] *Moore* v. *Moore*, [1892] P. 382; *Ridgway* v. *Ridgway*, 29 W.R. 612; *Pereria* v. *Pereria*, I.L.R. 5 Mod. 118; *Halligan* v. *Halligan*, 30 N.Z.L.R. 306; *DeLuca* v. *DeLuca*, 12 S.R.(N.S.W.) 619.
[4] Cf. 8 MOD.L.REV. at 156.

Viscount Simon L.C., who said in *Blunt* v. *Blunt*[5] that a consideration of primary importance is—

> The interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage, and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

The question of condonation of matrimonial offences brings into focus a third social interest, which is equally related to the interests already mentioned: it is the desirability of promoting the reconciliation of the parties to a marriage even though there has been some breach of the matrimonial relationship sufficient to justify a dissolution of marriage. The prospect of reconciliation cannot and must not be overlooked in any state of marital estrangement, and it is therefore fundamental that the law should not so disregard the future welfare and rights of innocent spouses as to deter them from forgiving the guilty party and resuming cohabitation. This accords with the rule which originated in the Ecclesiastical Courts that condonation is conditional, and that on breach of the condition the innocent spouse is remitted to his or her former rights.[6] On the other hand, however, reconciliation could rarely be expected if the terms are so onerous to the guilty party that the merest deviation from a course of model conduct will enable the innocent party to repudiate the reconciliation for good and all.[7]

The adjustment of these factors would be difficult enough where one could have recourse to complete statistical analyses of broken marriages, effective reconciliations and abortive attempts at reconciliation, so as to ascertain what was most socially advantageous. When this is made impossible by practical considerations and the operation of rules of evidence, so that a Court is bound to deduce a principle without such material, it may be said that it can achieve a result only by trial and error, or by reliance upon irrelevant considerations, historical analogies and other devices of competing or meaningless reference. It may be asserted with some force that this is

[5] [1943] A.C. 517 at 525.

[6] *Cramp* v. *Cramp*, [1920] P. 158; *Henderson* v. *Henderson*, [1944] A.C. 49.

[7] Cf. *Collins* v. *Collins* (1884), 9 App.Cas. 205, where Lord Blackburn, in commenting on *dicta* of Sir John Nicholl in *Durante* v. *Durante*, 1 Hagg.Ecc. 733, said: 'If this language is to be taken without qualification, and followed to its logical result, it would follow that, however long a spouse had, after condoned adultery, lived chastely and in full performance of all that a spouse should do, any lapse, however slight and venial in itself from duty, revived the old adultery, and obliged, or at least enabled, the Court to decree a separation.'

what has happened and that the diverse decisions on condonation, both in England and Australia, represent attempts to find a principle of real social utility by experimental groping in the dark. In form, all the decisions on this subject are rested on the same premises, the same authorities are cited and analysed, and the principles and practice of the Ecclesiastical Courts are called in aid. A review of the decisions on this subject in recent years serves to show that authority alone has been a poor guide to the Courts in arriving at the conclusion now established by *Beard* v. *Beard*.[8] The variations in the judgments of first instance, particularly the recent ones,[9] have not been due to a failure to understand the *ratio decidendi* of earlier cases nor to any difficulty in applying those cases; nor has the passage of the Matrimonial Causes Act, 1937, had such an influence as to give rise to these decisions because, although it has liberalised the divorce law and assimilated divorce and judicial separation, the confusion in the decisions is equally manifested in England both before and after its passage.

The judgment of Scott L.J. in *Beard* v. *Beard* contains a guarded but implicit recognition of the process I have mentioned. His Lordship said:—

> Where the post-condonation offence is desertion, the adoption of Mr. Justice Hodson's principle would have the effect of depriving the revival rule of any practical value; for it would not operate till the desertion had lasted long enough to make it superfluous. But, in truth, comparison on grounds of public policy is for Parliament, which can legislate, rather than for the Courts. The trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty; and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives.
>
> In my opinion, any other rule of law would not only be socially intolerable, but inconsistent with the real principle underlying the long line of cases and expressly mentioned in several of them, though in slightly varying language—namely, that there must be no substantial digression from

[8] This is well borne out by the discussion of the decisions in R. Cross, *op. cit.*, 8 Mod.L.Rev. 149.

[9] *Higgins* v. *Higgins*, [1943] P. 58 (Pilcher J.); *Ainley* v. *Ainley*, [1945] P. 27 (Barnard J.); *Harrison* v. *Harrison*—unreported—(Wallington J.); *Beard* v. *Beard* (1945), 61 T.L.R. 356 (Hodson J.).

> the path, to which their marriage vows have bound the parties, of what is sometimes called in old but telling words 'conjugal kindness'. A 'matrimonial' offence within the cognisance of the Divorce Court, in my opinion, simply means conduct which, in the eye of the Court, is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree, provided always that it be sufficiently serious for the Court to regard it as a substantial breach of duty.[10]

It is significant that in Australia the same process has ensued, but over a longer period of time, and in this connection it must be remembered that the Australian States have had grounds for divorce comparable with those contained in the English Act of 1937 since the last decade of the nineteenth century. The grounds for dissolution at the suit of either husband or wife include desertion for three years,[11] and adultery *simpliciter* as well as in its aggravated forms. In addition, there are other grounds such as habitual drunkenness, with either cruelty or neglect of domestic duties, repeated assaults and cruel beatings, and similar offences.[12]

Under the New South Wales statute[13] which, like English legislation and the Acts of other Australian States,[14] declares condonation to be an absolute bar,[15] the question of what conduct would revive condoned cruelty arose in 1897 in *Lewis* v. *Lewis*.[16] In that case desertion for three months was held to effect a revival, and in 1901 in *Murphy* v. *Murphy*[17] it was held that habitual drunkenness and cruelty which had been condoned were revived by a subsequent act of cruelty. Some years later the Victorian Supreme Court reached the same conclusion in *Strong* v. *Strong*,[18] but in the same year, 1910, the pendulum swung the opposite way in *Gorry* v. *Gorry*.[19] This swing was accentuated in 1912 when the Supreme Court of New South

[10] 61 T.L.R. at 559.
[11] Some States require desertion for five years, *e.g.*, South Australia and Queensland; one State (Tasmania) requires desertion for two years only.
[12] Joske, *Laws of Marriage and Divorce in Australia* (1936), 46–9.
[13] Matrimonial Causes Act, 1899, s. 18.
[14] Joske, *op. cit.* 214.
[15] The Acts of the various Australian States are not uniform in the offences which can be absolutely condoned; in all States, however, the local statute expressly deals with condonation of adultery and declares such condonation to be an absolute bar. Joske, *op. cit.* 214.
[16] 18 N.S.W.L.R. 19; cruelty was a ground for judicial separation under the statute then in force, the Divorce Amendment and Extension Act, 1892 (55 Vict. No. 37), s. 1.
[17] 19 W.N.(N.S.W.) 53.
[18] (1910), V.L.R. 122.
[19] 27 W.N.(N.S.W.) 183.

Wales in *DeLuca* v. *DeLuca*[20] held that nothing short of a matrimonial offence which was a ground for independent relief in the Divorce Courts would revive condoned adultery. The respondent's conduct in that case consisted of indecent familiarities with a maid-servant which fell far short of evidence of adultery but which, it was argued, sufficiently operated to revived the condoned adultery. Although Street J., in giving the judgment of the full Court, dealt fully with the effect of the Matrimonial Causes Act and the practice of the Ecclesiastical Courts, he did not overlook the fact that social interests were involved, and he conceived them to be as follows :—

> In the interests of society, as well as of that certainty which is or should be a feature of the law, it appears to me on principle to be sounder and wiser that it should be clearly understood that in suits for dissolution of marriage nothing short of conduct amounting in itself to an offence cognisable by the Court will be sufficient to revive a condoned offence, than that, by laying down a rule that misconduct falling short of this will suffice, an element of uncertainty and precariousness should be introduced, not only into the matrimonial life of the erring but forgiven party, but also into the administration of the law.[21]

This was accepted as the law in Australia for many years, and the principle of *DeLuca* v. *DeLuca* was applied in all States and was accepted as the prevailing rule of practice.[22] It was not until 1934 that the Australian Courts began to discard this principle, and a complete transition was not effected until 1945. The first departure from the *DeLuca Case* was made by the South Australian Supreme Court in *Hood* v. *Hood*,[23] where it was decided that desertion for six months revived condoned bigamous adultery. Napier, J., in whose judgment the other members of the Court concurred, said :—

> There is no reason why the reconciliation should not be regarded as an agreement with mutual obligations. The innocent party agrees to overlook what has happened, and the guilty party agrees to behave towards the other as he or she ' has a right to expect '. If any complaint is made of a breach of that agreement the Court should be able to

20 12 S.R.(N.S.W.) 619.

21 *Ibid.* at 627. It is a novel proposition that the certainty of legal rules exerts any influence on the conduct of parties to a marriage, at any rate, so far as concerns their emotions and the question whether the erring spouse will agree to reform his ways.

22 *E.g.*, *Crowder* v. *Crowder* (1920), W.A.L.R. 39; *Baker* v. *Baker*, 47 W.N. (N.S.W.) 5; *Deane* v. *Deane* (1929), Q.S.R. 124.

23 (1934) S.A.S.R. 283.

> say whether the breach is one that ' goes to the root of the contract ' . . . . For that purpose it can look at the whole of the conduct of both parties, and say whether, in the circumstances of the particular case, the subsequent conduct of the guilty party shows such a repudiation of the marriage bond—and, therefore, of the agreement—as to justify the innocent party in resiling from the promise to forgive the past delinquencies. If the subsequent conduct amounts to a ' matrimonial offence ' it would seem that—*cadit quaestio*; but if not, regard should be had to the nature and quality of the conduct that is forgiven, and of the subsequent conduct, and to the interval during which there has been no cause of complaint. But if the Court should come to the conclusion that the guilty party has definitely repudiated the agreement, then justice and reason require that the innocent party should be absolved from the reciprocal obligation and be remitted to his or her former position.[24]

Though this decision was a strong affirmation that conduct not a ground for independent relief might revive a condoned offence, the position in Australia was not completely stabilised until the Victorian and New South Wales Courts fell into line. *Davies* v. *Davies*[25] represented the agreement of the Victorian Supreme Court with the reasoning of *Hood* v. *Hood*, and as recently as 1944 the Supreme Court of New South Wales in *Bridges* v. *Bridges*[26] overruled its earlier decision in *DeLuca* v. *DeLuca* and held that a course of conduct falling short of actual adultery, but indicating a predisposition towards the commission of adultery with the same person, was effective to revive adultery which had been previously condoned.

Although the conclusion of the three Judges who heard the appeal in this case was unanimous, they formulated slightly different tests to determine whether the conduct of a spouse whose previous guilt had been condoned would operate to revive the condoned offence. Jordan C.J. said that a revival would be effected by marital misconduct so serious in all the circumstances as to make it reasonable for an innocent spouse, wishing to maintain his self-respect, to withdraw from further cohabitation with the guilty spouse.[27] Davidson J. based his conclusion on the fact that the conduct alleged against the

[24] *Ibid.* at 295.
[25] (1942) V.L.R. 19; in that case Mann C.J. said ' the respondent's conduct was such as to make it entirely inconsistent with self-respect or safety for the petitioner to continue living with him '.
[26] 45 S.R.(N.S.W.) 164.
[27] *Ibid.* at 173.

respondent was ' of a type sufficiently serious to establish such a lack of recognition of marital obligations as to cause substantial injustice to the complaining party '.[28] The other member of the Court, Edwards J., considered that a revival would ensue from conduct which was not a ground for independent relief in the Divorce Court, but that the conduct must be ' both grave and weighty, repugnant not merely to the feelings of the condoned spouse but to the standards of conduct imposed on each of the spouses by the marital bond '.[29]

Whichever of these various formulæ be adopted three observations seem warranted. The first is that they all show a trend in the Australian cases closely similar to that manifest in the Court of Appeal decision in *Beard* v. *Beard*; Scott L.J. phrased the test as whether ' the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty '.[30] The second is that all of them enlarge the field of judicial discretion by removing the automatic test of whether the conduct proferred to destroy the bar would constitute an independent matrimonial offence. The third and final observation is, that in the field of choice thus created the Courts must willy-nilly find their grounds of decision in a consideration and adjustment of the interests at stake. It is diffidently suggested that, ordinarily, the following interests are involved :—

(a) The social interest in the stability of the family institution. This operates several ways :—

(i) In so far as the revival of the condoned ground of divorce facilitates dissolution of the marriage, it operates against easy revival.

(ii) In so far as condonation in lieu of divorce gives the marriage another chance, whichever rule as to revival results in the greater number of condonations is favoured by this same interest. In general, it is possible to say that more difficulty in revival of the old offence will tend to dissuade the injured spouse from any condonation at all; this, therefore, tends to favour easy revival.

(iii) In so far as condonation gives the marriage another chance, this same interest suggests

[28] *Ibid.* at 178.
[29] *Ibid.* at 179; this test is similar to that formulated in *Yeatman* v. *Yeatman*, L.R. 1 P.&D. 489, as to what conduct justifies withdrawal from cohabitation and so constitutes a defence to a suit based on desertion or a restitution suit.
[30] 61 T.L.R. at 559.

that the guilty party should not be under so constant a threat of revival of the old offence as to render the relations of the reunion unstable and over-sensitive. This tends to favour more difficult revival.

(b) The social interest in the minimum life and happiness of spouses. This tends to favour easier revival as facilitating a dissolution if one spouse desires it.

(c) The social interest in the lives of dependants and the family. This tends to favour a more difficult rule of revival if it is considered after the offence has been condoned by a resumption of cohabitation because it supports a continuance of the marriage; on the other hand, this interest favours an easier revival if it is considered at an earlier stage, when the injured spouse is asking whether he or she should end the marriage or give it another chance by condoning his or her partner's conduct.

(d) The social interest in the general morals. This will usually favour easy revival as operating to deter the guilty party from further misconduct.

It will be obvious that the degree and direction of pressures of these various interests will rarely be alike in any two instances. A rule, therefore, which requires the Court to adjust them in the particular case is a rule requiring the Court to make an individualised application of justice to each marriage. The movement in Australian and English Courts towards this rule is, therefore, a movement to bring this part of the law of marriage out of the area of detailed rules into the area of individualisation of justice.

It has often been pointed out that the course of decision of Common Law Courts adapts the law to changed conditions, and moves in a manner which the reasons offered by the Courts would not lead one to expect.[31] It is but another illustration of this strange power of our Courts that in this field the judicial leaning coincides with much justice and sociological work stressing the importance, for instance, in the matter of matrimonial conciliation Courts, of recognising the unique feature of every marriage relationship.

R. Else Mitchell.

[31] Stone, *Recent Trends in English Precedent* (1945), 000.

SPARE-TIME ACTIVITIES OF EMPLOYEES

QUESTIONS of great legal and sociological interest were at stake in *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350. The plaintiffs were manufacturers of thermionic valves, including 'midget valves' which are used for hearing aids. At one time they were the only British firm to supply these midget valves with respect to which they seem to have enjoyed a monopoly in the British market. The defendants, two of whose directors had formerly held responsible positions in the employment of the plaintiffs, set up a manufacture of hearing aids, including midget valves, which they intended to put on the market at a price lower than that demanded by the plaintiffs. The assembling of midget valves—highly complicated instruments in a very small compass—requires the employment of the most skilled manual workers, of the sort of trained labour which can be expected to be scarce at almost any time and which, in war-time, must have been practically unobtainable. The plaintiffs' factory was a scheduled undertaking under the Essential Work Order.

According to the evidence before the Court of Appeal the defendant company and those associated with it induced five of the plaintiffs' highly skilled workmen to assist in the assembling of valves at the defendants' factory on Sundays, *i.e.*, during what was, from the plaintiffs' point of view, the workers' spare time. The workmen did not, according to their own affidavits, receive any wages from the defendants, but 'payment by way of expenses for their work'. Morton L.J. was not 'quite sure what that means'. One may be permitted to suspect that here, as so often in different contexts, the term 'expenses' was tainted by a hue of deliberate ambiguity.

The plaintiffs asked for, and obtained from the Court of Appeal (reversing an order of Cohen J.) an interlocutory injunction restraining the defendants from continuing what in the view of the Court amounted to an inducement to commit a breach of contract. The workmen themselves were not parties to the suit.

The question—the decisive question—whether the workmen's conduct was a breach of their contract of employment with the plaintiffs was answered in the affirmative by the

Court of Appeal. It was a case *primæ impressionis.* In the submission of the present writer the decision of the Court was manifestly right, but it was arrived at with great hesitation and with that most scrupulous weighing of the arguments in favour and against an even limited legal control of a workman's spare-time activities which the importance of the matter clearly deserved. Had there been a disclosure of confidential information on the part of the workmen, there would have been hardly any problem at all, but, according to the evidence, no such information had passed from the workmen to the defendants. Hence, the Court had to face the problem in its full magnitude: is it—or can it be—an implied term of the contract of employment of a manual workman that he must not, during 'his own time' assist his employer's competitor?

This question can be approached from two different angles: It might be argued that an obligation to abstain from work during leisure hours can be spelled out of the contract of service with the result that any kind of gainful employment during a worker's spare time would be a breach of contract. This line of reasoning was rejected by the Master of the Rolls. The Court of Appeal saw the breach of contract not in the fact that the five workmen used 'their own time' for work instead of recreation, but in the assistance they gave to their employer's competitor. The case was decided on the ground that there is implied in every contract of employment a duty of fidelity which the employee owes to the employer. This is well established, although the Courts have fortunately been anxious to circumscribe this duty within narrow limits. It is obvious that the extent to which an employee's freedom of action is restricted by the fidelity owing to his employer must vary from case to case. The higher the position of the employee in the organisation of the undertaking, the greater must be his duty of fidelity. A man entrusted with responsible work, a factory manager, a confidential secretary, or—to use an example given by the Master of the Rolls—a solicitor's clerk, is bound by more stringent obligations in this respect than, say, an unskilled operative, a shop assistant or an office boy. The duty of fidelity arises from the employment relation as such, but its scope is determined by the character of the work. There is always a danger of blurring the line between 'fidelity' and 'fealty', of 'feudalising' the contract of employment by linking the employee's obligation not to violate his employer's interests with an act of submission to those interests on his part, instead of rooting it

in the character of the work he is liable to do. *Vestigia terrent.* Recent developments on the Continent have taught the world a lesson about the political implications of the feudalisation of employment.

The Court of Appeal has avoided this pitfall. Both the Master of the Rolls and Morton L.J. (Bucknill L.J. merely expressed his assent) refused ' to express any view of such a general nature as that all work done for a firm in the same line of business as the employers in the spare time of the employees is a breach of contract '. The duty of fidelity with regard to abstention from competition was not formulated in the abstract. Morton L.J. emphasised four factual elements: the inevitable damage to the employer, the secrecy maintained by the workmen (pointing, as it were, to a *mens rea*), (most important) the skilled nature of their work, and the risk that, though this had not actually happened in the past, the activities of the workmen might lead to the communication of confidential information to the defendants. Similarly, the Master of the Rolls deprecated any attempt to define the ' vague duty of fidelity ' and pointed to its connection with the character of the work done. No general principle as to abstention from competition during leisure hours was formulated, and the decision thus boiled down to a slight but important extension of the principle of cases such as *Wessex Dairies, Ltd.* v. *Smith*, [1935] 2 K.B. 80, in which certain types of competitive acts done during the employer's time had been stigmatised as breaches of the duty of fidelity. It appears that the solution of the problem tentatively suggested by Batt (*Law of Master and Servant* (3rd ed.), p. 146) has found favour with the Court of Appeal.

On the most important point, the freedom of the employee to use his leisure time as he pleases, the language used by the Master of the Rolls in the case under review is very emphatic: ' The law would, I think, be jealous of attempting to impose on a manual worker restrictions the real effect of which would be to prevent him utilising his spare time. He is paid for five-and-a-half days in the week. The rest of the week is his own, and to impose upon a man, in relation to the rest of the week, some kind of obligation which really would unreasonably tie his hands and prevent him adding to his weekly money during that time would, I think, be very undesirable.' Again: ' It would be most unfortunate if anything we said, or any other court said, should place an undue restriction on the right of the workman, particularly a manual

workman, to make use of his leisure hours for his profit.' The employee does not, by an implied term of the contract, put the whole of his strength at his employer's disposal. The employer does not, by the contract of employment, acquire a legally guaranteed interest in the 're-production' of his workers' labour power by recreation and abstention from work during the latter's spare time. If the employer wishes to achieve this result, he must, and may, do so by an express stipulation in the contract. Where a relevant collective agreement contains a provision to this effect, it will presumably become part of the contract of employment as a trade usage.

This, however, does not conclude the matter. What, it may be asked, is the inter-relation between this principle of the common law and that body of legislation which puts a limit upon an employee's working hours? English statute law does not establish a general maximum day for adult male workers, but it does regulate the working hours of certain categories, the most important of which are mineworkers below ground (Coal Mines Regulation Act, 1908, as amended by Coal Mines Act, 1930), and drivers of various kinds of heavy motor vehicles (public service vehicles such as buses and coaches, goods vehicles, and some others) (Road Traffic Act, 1930, s. 19, as amended by Road and Rail Traffic Act, 1933, s. 31, and by Road Traffic Act, 1934, s. 7). In both cases the maximum hour norm is addressed to the employer as well as to the employee. A coal miner who remains below ground for more than the statutory seven-and-a-half hours commits a criminal offence no less than the owner or manager who causes or permits him to do so (sections 1 and 7 of the Act of 1908). A lorry driver or bus driver who drives a vehicle for a continuous period of more than five-and-a-half hours or during the statutory ten 'hours for rest' in each twenty-four-hour period can be fined as can his employer who tolerates this contravention of the statute (section 19 of the Act of 1930). There is, however, nothing to prevent the coal miner or the lorry driver from doing heavy agricultural work outside his working hours and thus to frustrate one of the objects of the statute, *viz.*, to secure to him a period of rest. The hours of drivers of motor vehicles have been restricted 'with a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue'. It is therefore in their case, and as far as the present writer is aware, in their case alone, that the law has ventured on a definition of what are or, rather, what are *not*

'hours for rest'. A driver is not at rest at any time during which he 'is bound by the terms of his employment to obey the directions of his employer, or to remain on or near the vehicle, or during which the vehicle is at a place where no reasonable facilities exist for the driver to rest away from the vehicle' (1933 Act, s. 31 (1)). He is 'at rest' if he does outside work. The law does not pry into the spare-time activities even of those workers whose opportunities for recreation are a matter of public safety.

If we turn to the statutory provisions which limit the hours of work of women and of young persons—far more numerous and extensive in application than those concerned with adult men—we find that they are addressed to the employer (or the 'occupier' of a factory) only and not to the employee. In the case of factory legislation the law makes it virtually impossible for a woman or a young person under eighteen to be employed in one factory during what are leisure hours from the point of view of another factory. They must not be employed in a factory on Saturday afternoons or at night (section 70 (*b*) of the Factories Act, 1937) or on Sundays (section 77) and therefore cannot use these periods for gainful employment in a factory. Moreover, the combined effect of the maximum 'spread-over' of eleven hours (section 70 (*b*)) and of the principle of continuous employment (section 70 (*d*)) precludes a woman or young person from seeking occupation in a factory during 'leisure hours'. The principle of continuous employment—in many ways one of the corner stones of factory legislation—compels the employer (occupier) to employ all women and young persons in one factory at the same time. If, therefore, the spread-over in factory X is from 7 a.m. to 6 p.m. and in factory Y from 8 a.m. to 7 p.m., it is illegal for the occupier of factory Y to employ a female worker of factory X from 6 to 7 p.m. It will be seen that the law achieves its aim of preventing the migration of workers from one factory to another by a series of norms addressed to the employer himself. But—and this is the important point—quite apart from the numerous exceptions contained in the Factories Act itself, there is nothing to preclude a woman or young person from being gainfully employed during leisure hours in any business not carried on by the occupier of the factory (section 75 of the Act).

With respect to young persons the risk of frustrating the purposes of the hours-of-work legislation is much reduced by

section 1 (4) of the Shops Act, 1934. No young person must be employed about the business of a shop if, to the knowledge of the occupier of the shop, he has on the same day already reached the maximum of permitted hours in a factory.

It would be possible to pursue this inquiry through other branches of hours-of-work legislation, such as the Metalliferous Mines Regulation Act, 1872, the Shops Acts, and the Young Persons (Employment) Act, 1938, but the result would be the same; there is only a very limited guarantee against multiple employment.

The question, therefore, arises why it is that the law has done so little to protect the employee against the temptation of using his spare time for work instead of recreation. The answer is obvious. It is impractical to try to enforce legislation of this kind against the individual worker. In a democratic community the use of a person's leisure hours lies beyond the border of the province of the law. Nothing can enforce standards of conduct in this respect save the self-imposed discipline of the working class mediated through the mechanism of the trade unions. It is for the trade unions to see to it that the freedom to use for work what should be a period of rest is not abused by the individual. In this case as in so many others, trade union action, far from running counter to the establishment of statutory standards, is indispensable in order to make them effective.

This is particularly true in conditions of full employment. Problems such as those before the Court of Appeal have not hitherto engaged the attention of the Courts because the temptation to which the five workmen employed by the plaintiffs succumbed will only rarely exist where labour is easily and readily obtainable. The case under discussion enables us to cast a first glance at some of the questions of labour law which arise in conditions of full employment.

Full employment, according to the definition of Sir William Beveridge (*Full Employment in a Free Society*, pp. 18 and 19, Nos. 4 and 5), means 'having always more vacant jobs than unemployed men, not slightly fewer jobs'. 'The proposition that there should always be more vacant jobs than unemployed men means that the labour market should always be a seller's market rather than a buyer's market.' The situation before the Court of Appeal in the instant case was, it is submitted, not, as the Master of the Rolls put it, merely an outcome of 'peculiar times'. Indeed, the repeated emphasis laid by the Master of the Rolls on the abnormal character of

the situation shows how much the thinking of eminent judges no less than that of employers, trade unionists, and others is still permeated with the unstated assumption of unemployment. 'In normal times, if it had not been for war and post-war conditions and regulations, this particular controversy would never have sprung up, because the plaintiffs would have had in their hands the obvious remedy of discharging the employees in question and replacing them with others more trustworthy.' 'In normal times . . . these employees could have been got rid of on twenty-four hours' notice, and no doubt there were skilled people who could have been obtained to take their place.' The subconscious mind of most of us still conceives of 'normal times' as times in which the supply in the labour market exceeds the demand. Even our legal ideas are still largely shaped by this assumption. Once we have grasped the implications of the fact that not unemployment, but full employment (as defined by Sir William Beveridge) is to be the normal state of affairs, we shall be prepared to see in the principles laid down by the Court of Appeal a matter of eminent practical significance. The refusal of the common law to interfere with the use of the worker's spare time (apart from cases of unfair competition) side by side with the corresponding abstemiousness of statute law, must be welcomed. But, given full employment and the temptations it offers to the individual worker, this self-restraint of the law would be not beneficial but detrimental without an understanding and effective trade union policy.

It is perhaps not without interest that the legal problems which were before the Court of Appeal have been the subject-matter of some difference of opinion in France and in Germany.

The legal prohibition of competitive activities, at any rate in the case of salaried commercial employees, has a very long history on the Continent. It goes back to the commercial law of medieval Italy, and Goldschmidt, *Universalgeschichte des Handelsrechts* (p. 249, note 44) quotes a law of the cloth makers' guild of Florence of 1301 to this effect. But the principle did not find its way into the French Codes. Neither the *Code Civil* nor the *Code du Travail* nor the *Code de Commerce* contains any express provision dealing either with the employee's duty of fidelity or with the use of his leisure hours, but the *Cour de Cassation* solved the problem in a manner similar to that adopted by the Court of Appeal. In *Perrin* c. *Vidal* (18.1.16, Dalloz, 1918 I, 41) the highest French

Court decided that it was not of the essence of a contract of employment that the employee should put the whole of his work and of his time at the disposal of the employer. More than that: the Court held that an employee whose time was not entirely taken up by his duties was free to devote his spare time to other work, but only to work of a different nature, which could not have any prejudicial effect upon the business of the employer. In a Note to this decision Louis Sarrut calls the principle that the employee is free to dispose of his spare time '*pas sérieusement contestable*', and expresses his substantial agreement with the limitation imposed upon the principle by the Court. It is easy to see that this limitation is somewhat more stringent than that imposed by the Court of Appeal but that the general approach to the problem is the same. In view of this decision it is perhaps a little surprising to find that Planiol and Ripert (*Traité Pratique de Droit Civil Français*, 1932, vol. XI, No. 845, p. 78) reject the view of the *Cour de Cassation* (without mentioning the decision) and with it the rule which Sarrut had called incontrovertible. Quoting two decisions of lower Courts of 1860 and of 1899, Planiol and Ripert argue that, as a matter of principle, an employee is in the service of one employer only, that he must not accept work from any other employer (without the former's consent), and that all this follows from the duty of fidelity owing by the employee to the employer. The hours of rest, they say, which have been given to the employee by contract or statute, are intended to allow him to live his life with his family '*et de refaire ses forces, en vue de fournir un meilleur travail*'. It is true that they somewhat restrict this extreme view by pointing out that there would be a breach of contract only if the work was '*pénible*' (and of course always if it was competitive), also that usage frequently permits more latitude. Nevertheless, this leading French treatise propounds that very 'reproductive' theory of leisure time which has been rejected by the Court of Appeal and its conflict of opinion with the *Cour de Cassation* illustrates the difficulty of the problem.

The German Commercial Code of 1897 provides in section 60 that a salaried employee charged with 'commercial' as distinguished from 'technical' duties must not, without the employer's consent, set up a commercial business of any kind or enter into commercial transactions in his employer's line of business either for his own or any other person's account. The Code permits the use of the employee's spare time for gainful employment, provided it is not

commercial 'self-employment' of any kind or competitive from the employer's point of view. There is nothing in German statute law to place any limitations on the spare-time activities of technical salaried employees, manual workers, etc. The *Reichsgericht* (RGZ, vol. 72, p. 393) refused to place any restraint on the use of an employee's leisure time as such and decided that he was free to accept gainful employment, but it is *communis opinio* that even outside the field of application of the Commercial Code an employee must refrain from competing with his employer in such a way as to inflict harm on his business, at any rate if the employee belongs to one of the more highly paid categories. This is a cautious inference from the general duty of fidelity owing by the employee to the employer (see Hueck-Nipperdey, *Lehrbuch des Arbeitsrechts* 1927, vol. I, p. 162). German legal doctrine and case law under the influence of Gierke and Sinzheimer tended to emphasise the 'personal' as distinguished from the 'obligatory' element of the employment relationship. Nevertheless, the practical conclusions it reached with regard to the duty of fidelity and its extent are not dissimilar from those found in this country and in France. In the opinion of some learned writers it might be a breach of contract for an employee to use his strength on outside work to such an extent as to impair his ability to perform his contractual duties, and one author (Oertmann, *Deutsches Arbeitsvertragsrecht*, p. 190) points to the shortening of working hours, to the eight-hour day and its social purposes as an argument in favour of this doctrine. The present writer is not aware of any decision to this effect.

O. KAHN-FREUND.

SOLOMONS *v.* ROSS AND INTERNATIONAL BANKRUPTCY LAW

Solomons v. *Ross*,[1] the leading case on the effect in England of bankruptcy declared abroad, has played an important part in the evolution of international bankruptcy law. From *Solomons* v. *Ross*, decided in 1764, it was concluded that the doctrine of ubiquity of bankruptcy is part of English law. Beginning with Savigny,[2] who relied on Story [3] for his information, the supporters of the theory that bankruptcy declared at the domicil of the debtor must be recognised everywhere,[4] have referred to the position taken by the English Courts. Objection to the doctrine of ubiquity, on the other hand, led to the refusal of the Courts in the United States [5] to follow *Solomons* v. *Ross*.

In *Solomons* v. *Ross* trustees in bankruptcy appointed in Amsterdam were allowed to collect assets in England which had been garnished by an English creditor shortly before the trustees were appointed in Amsterdam. The case is known from Henry Blackstone's *Reports*. Because of the scantiness of the report the House of Lords in a relatively recent decision [6] refused to accept and act upon the case.

There is another report on *Solomons* v. *Ross* which has become available only a quarter of a century after the case was decided. This report, which seems to have gone unnoticed, furnishes additional information on the case and permits a more precise evaluation of the decision. Because of this, and of the increasing importance of the question of the extraterri-

[1] 1 H.Bl. 131, note.

[2] F. K. von Savigny, *System des heutigen römischen Rechts*, Vol. VIII (1849), s. 374 note (*mm*); in Guthrie's translation published under the title *Treatise on the Conflict of Laws* (2nd ed. 1880), at p. 262.

[3] Story's *Commentaries on the Conflict of Laws* were published in 1839.

[4] The supporters of the theory of ubiquity are listed in C. Valensi's article 'Faillite' in Lapradelle-Niboyet, *Répertoire de Droit International*, Vol. VIII (1930), pp. 286 ff., at p. 291.

[5] *Harrison* v. *Sterry* (U.S. 1809), 5 Cranch 289, at p. 302, *per* Marshall C.J.; *Taylor* v. *Geary* (Conn. 1787), Kirby 313; *Blake* v. *Williams* (Mass. 1828), 6 Pick. 286; *Wallace* v. *Patterson* (Md. 1790), 2 H.&McHen. 463; *Saunders* v. *Williams* (1830), 5 N.H. 213; *Abraham* v. *Plestoro* (N.Y. 1829), 3 Wend. 538; *McNeil* v. *Colquhoon* (1797), 2 N.C. 24; *Milne* v. *Moreton* (Pa. 1814), 6 Binn. 353; *Topham* v. *Chapman* (S.C. 1817), 1 Mill. 283. *Contra*: *Holmes* v. *Remsen* (N.Y. 1820), 4 Johns.Ch.R. 460, *per* Chancellor Kent. Cf. J. Kent, *Commentaries on American Law* (14th ed. 1896), Vol. II, at p. 406; J. Story, *Commentaries on the Conflict of Laws* (8th ed. 1883), at p. 572.

[6] *Gailbraith* v. *Grimshaw*, [1910] A.C. 508, at p. 511.

torial effect of bankruptcy in an era of expanding international commerce, the decision warrants re-examination with due regard to present-day conditions.

Solomons v. *Ross*, decided by Justice Bathurst in 1764, is reported in Henry Blackstone's *Reports* in a note to *Folliott* v. *Ogden*,[7] which was before Lord Loughborough in 1789. The same note reports two other decisions rendered in favour of foreign trustees in bankruptcy; one is an English decision, *Jollet* v. *Deponthieu*,[8] decided by Lord Chancellor Camden in 1769, which again involved Dutch trustees in bankruptcy who claimed assets that were garnished after the Dutch declaration of bankruptcy; the other is Irish, *Neale* v. *Cottingham*,[9] before Lord Lifford, in which an Irish creditor was ordered to refund to English trustees in bankruptcy money which he had obtained by garnishee proceedings begun after the bankruptcy declaration in England. The date of the Irish decision, according to the note in Blackstone's *Reports*, is November 16, 1764. This date is incorrect. Proceedings were begun on that date, but the case was decided on July 16, 1770, six years after *Solomons* v. *Ross*. Finley's *Digest and Index of the Irish Reports*, published in 1830, reports the case from manuscript.[10] Another report of *Neale* v. *Cottingham* is contained in Wallis' *Irish Chancery Reports*, published by Lyne in 1839.[11] Wallis' *Reports* present the arguments and the opinions of Lord Lifford and the two judges whom the Lord Chancellor had called to his assistance. The plaintiff in the case, the English trustee, relied upon *Solomons* v. *Ross* for his claim for the funds obtained by an Irish creditor after the bankruptcy declaration. A report of *Solomons* v. *Ross*[12] appears in a note[13] to the case. The data on *Solomons* v. *Ross* in Wallis' *Reports* are in accordance with those in Blackstone's *Reports*, but more explicit.

The following is a summary of the facts in *Solomons* v. *Ross* as taken from Blackstone's *Reports*. On December 18, 1759, the Amsterdam merchants Deneufville stopped payment. On January 2, 1760, 'curators' of their property were appointed

[7] 1 H.Bl. 123.
[8] 1 H.Bl. 132, note.
[9] 1 H.Bl. 132, note.
[10] At p. 36, note.
[11] At p. 54.
[12] *Israel Levy Solomon* (*sic*), *Jolle Jolles and Johannes Rickvett* v. *Michael Solomon* (*sic*), *Hugh Ross, and Wynand and David Deneufville*, Wallis-Lyne, *Irish Chancery Reports*, 59, note.
[13] An editorial states, *eodem*, that *Solomon* v. *Ross* was given in a note to Mr. Wallis' MS. without indication of the source.

by the Chamber of Desolate Estates in Amsterdam. Previously, on December 20, 1759, Ross, an English creditor, had garnished £1,200 in the hands of Michael Solomons in London which were due from Solomons to the Deneufville. In March, 1760, Ross obtained judgment by default on the garnishment, whereupon a writ of execution issued against Michael Solomons. Being unable to pay, Michael Solomons gave Ross a promissory note for the amount of the judgment. In proceedings brought by the Dutch 'curators' it was held that Michael Solomons must pay the £1,200 to the 'curators', and that Ross must surrender the promissory note to Michael Solomons.

The note in Wallis' *Reports* corroborates these facts. Shortly before their failure, the Deneufville had accepted bills drawn upon them by Ross to the amount of £1,200, due December 19. On the other hand, on the fourteenth of that month the Deneufville had drawn bills upon Ross in favour of Michael Solomons for £1,300 payable in February, 1760, which were duly accepted by Ross. At the failure of the Deneufville the bills drawn by Ross upon them were returned protested. Ross was obliged to discharge their drafts for £1,300 drawn upon him in favour of Michael Solomons. As soon as Michael Solomons had received this money to the use of the Deneufville, Ross instituted suit in the Lord Mayor's Court against the Deneufville, and by foreign attachment garnished the £1,300 in the hands of Michael Solomons. Upon execution, Michael Solomons gave him his promissory note for £1,200.

The Dutch 'curators' of the Deneufville bankrupt estate, Jolle Jolles and Johannes Rickvett,[14] designated Israel Levy Solomons their attorney to collect such of the bankrupt's effects as were situated in England. Through Israel Levy Solomons they entered suit in the Chancery asking that Michael Solomons might account for the bankrupt's effects in his hands at the time of the Deneufville failure, and might pay over the same to the 'curators' for the benefit of all the creditors. They also asked that Ross might be restrained from getting the effects into his hands under the note passed to him by Michael Solomons. The latter requested and was permitted to deposit the money due by him in the Bank of England for the use of the party having right thereto. The cause was afterwards heard by Justice Bathurst, in the absence of the Lord Chan-

[14] Apparently the same persons as in the second Deneufville insolvency case, *Jollet* v. *Deponthieu*, *supra*, note 8.

cellor, and the Court rendered its decree in favour of the Dutch ' curators '.

According to the note in Wallis' *Reports*, the case was decided ' upon the pleadings, and upon proof of the laws and usage of Amsterdam, and of the Chamber of Desolate Estates there, and of their admitting foreign creditors to share equally in the dividends, and upon proof of the bankruptcy '. The note begins with a statement dealing with the Chamber of Desolate Estates in Amsterdam :—

> By the constitution of the city of Amsterdam, allowed by the law of that province, and confirmed by the States General of the same, there is a court established, called the Chamber of Desolate Estates; who, upon a trader's absconding, refusing to pay his debts, or upon his own application, declaring himself unable to pay, have authority to take into their hands all his effects and debts wheresoever found; and then to appoint curators, in nature of our assignees, for the preservation of those effects for the benefit of all creditors. After this, the creditors are summoned, and the bankrupt is brought before the Chamber, together with his creditors, and if he can agree with them, and secure them their demands, or such part as they agree to accept, the effects are restored unto him; but if he cannot thus act, the effects are directed to be sold for the benefit of all creditors, and for their proportionate dividends of this fund, all foreign creditors are allowed to come in; and letters have been often sent from that Chamber to the Lord Mayor of London, requiring him to summon such English creditors; and it is looked in Amsterdam that all the foreign effects of such bankrupt, wherever situate, become vested in the Chamber upon the bankruptcy, and therefore, they admit foreign creditors to come in equally with natives.

So much for the contents of the note on *Solomons* v. *Ross* in Wallis' *Reports*. We may add that at the time of *Solomons* v. *Ross* an English translation of the Regulations for the Chamber of Desolate Estates in Amsterdam was available in London. Wyndham Beawes had reproduced the text in English in his *Lex Mercatoria Rediviva*[15] published in 1752. The Regulations provided that the curators appointed by the Commissioners of the Chamber ' shall endeavour to secure all the estates, effects, and debts, belonging to the said funds, whether within or without the jurisdiction of that city *or of this*

[15] At pp. 563 ff.

country '.[16] They also provided that the Commissioners shall appoint a day for the proof of claims, ' by which day all the known creditors inhabiting this city shall be summoned by the usual citation, *those abroad by letter of advice* '.[17] The Regulations did not stipulate that there was a relation back, as in English law, for the beginning of the effects of a bankruptcy adjudication. The sentence in Blackstone's *Reports* which immediately follows the statement of the second Deneufville case, *Jollet* v. *Deponthieu*, probably refers to the absence of such a rule: ' It appears from the proofs taken in the cause that a bankrupt's effects, by the law of Holland, vest in the curators only from the time of their being appointed, and not by relation to the time of the committing of the act of bankruptcy '.[18]

There were several issues involved in *Solomons* v. *Ross*. Was a Dutch trustee in bankruptcy at all entitled in the English Courts to claim funds located in England? Was such a claim blocked by the garnishment of the funds by Ross? According to the account in Wallis' *Reports*, a further question which was raised was: Would Ross receive his equal share in the distribution of the assets in Amsterdam?

Of the first two questions the more intricate was the effect of Ross' garnishment of the funds. The note in Wallis' *Reports* does not indicate, at least not directly, why the Court gave the funds to the Dutch trustees in bankruptcy although they were garnished by Ross.[19] An indirect answer may be found in the reference to the ' laws and usage of Amsterdam ' upon which, according to the note, the Court rendered its decision. Under Dutch law Ross would not have acquired any preference by garnishment proceedings. This is the result not of a rule in Dutch bankruptcy law, but due to the fact that under Dutch law attachments or garnishments did not give a preference to the attaching creditor over non-attaching or later-attaching creditors. Any creditor who filed his claim could share in the proceeds of executions proportionately. ' Equity

[16] Instructions and Orders for the Commissioners of the Desolate or Ruined Estates, s. 5; *Groot Placaat Boek*, Vol. IV, at p. 479. Italics supplied.
[17] Instructions and Orders, s. 17, *eodem*. Italics supplied.
[18] 1 H.Bl. 132, note.
[19] In 1711 and 1715, respectively, Lord Raymond and Sir Joseph Jekyll, when at the bar, had given opinions to the effect that the law of England takes no notice of a commission in Holland and that, therefore, the creditors in England may attach the effects in the City of London and proceed to condemnation. Opinions published in J. M. Barels, *Advysen over den Koophandel en zeevaert*, Vol. II (1781), at pp. 297, 308; reproduced in J. Henry, *The Judgment of the Court of Demerara in Odwin* v. *Forbes* (1823), Appendix D, at pp. 251 ff.

favours the diligent ' is not a maxim originating in Roman law. The ' priority ' system was not part of the Roman law applied in Holland, neither was it incorporated in Dutch statutory law.[20] When bankruptcy occurred after an attachment, the attached goods were simply taken over by the trustee in bankruptcy as a part of the bankrupt's estate.[21]

Today, too, the ' equality ' rule governs executions in various civil law countries, for example, in the Netherlands, France, Belgium, Italy.[22] The ' race of diligence ' system is in force in Germany, Austria and Scandinavia.[23] The fact that there are these two different systems is of importance in considering the possibility of achieving equality in international bankruptcy cases. At present, many countries do not recognise the effects of a foreign bankruptcy declaration,[24] or they recognise them only after the grant of an exequatur [25] which has no retroactive effect.[26] If a country which does not recognise a foreign bankruptcy belongs to the group applying the equality rule in executions, equal distribution can nevertheless be achieved. If the country applies the priority system, there will be inequality, and the local creditors, who are generally the first to attach,[27] will be favoured. Redress is possible if a local bankruptcy declaration can be obtained.[28] Presence of assets alone is not sufficient everywhere to give bankruptcy jurisdiction.[29]

20 Matthaeus, *De auctionibus* (1653), l. 1, c. 19, s. 63; Huber, *The Jurisprudence of my Time* (1686), in Gane's translation, 1939, Vol. I, at p. 368; Joh. Voet, *Ad Pandectas* (1698), l. 2, t. 4, s. 64; van der Linden, *Korte Schete van den Form van Procedeeren* (1781), at p. 128.

21 See, however, van der Linden, *Verhandeling over de Judicieele Practicque of Form van Procedeeren*, Vol. II (1798), at p. 102–103, regarding judicial liens resulting from attachment in execution proceedings.

22 Code of Civil Procedure of the Netherlands : s. 457 ff., 480 ff.; of France : s. 610, 656 ff.; of Belgium : s. 609, 656 ff.; of Italy : s. 646, 651.

23 German Code of Civil Procedure, s. 804 (3); Austrian Code of Executions, s. 256, 300; Swedish Execution Law, s. 58.

24 In Europe, *e.g.*, Germany, the Netherlands, Sweden, Switzerland. References in K. H. Nadelmann, ' International Bankruptcy Law : Its Present Status ', in 5 *University of Toronto Law Journal* (1944), at pp. 324 ff., 18 *Journal of the National Association of Referees in Bankruptcy* (1944), at pp. 104 ff.

25 *E.g.*, France, Spain. References : *eodem*.

26 French Cour de Cassation, June 26, 1905, Sirey, 1905, 1, 433, Dalloz, 1905, 1, 517, Clunet, 1905, 1014 (set-off made after bankruptcy declaration but before grant of *exequatur* held valid). Appeal Paris, June 1, 1906, Dalloz, 1909, 2, 9, Clunet, 1907, 135 (attachment before *exequatur* held valid).

27 ' And because oftentimes creditors in regard they live at distance or upon other occasions are prejudged and preveened by the more timeous diligence of other creditors, so that before they can know the condition of the common debtor, his estate is comprised . . . '. Act for ordering the payment of debts between creditor and debtor. Charles 2, 1661, c. 62.

28 Cf. *Dulaney* v. *Merry & Son*, [1901] 1 K.B. 536, 544, where this point was considered.

29 In Austria, presence of assets is sufficient to give bankruptcy jurisdiction : Bankruptcy Act of 1914, s. 63. Same : U.S. Bankruptcy Act, 1898, s. 2 (*a*) (1), *infra*, note 58. In Germany, domicil, a local commercial establishment, or a

Returning to *Solomons* v. *Ross*, Ross would not have acquired under Dutch law a preference by attachment proceedings. Ross' attachment would not have given him a preference under English law either, assuming that bankruptcy had been declared in England. The bankruptcy statute of 1623 denied a preference to attachments not fully executed at the time of the bankruptcy.[30] Here was, therefore, a situation where the attachment would not have given a preference under either law, Dutch or English, had bankruptcy been declared and the attachment made in the same country. The decision shows that the Court would not allow the attaching creditor to retain his preference just because bankruptcy and attachment occurred in different countries.[31] By what reasoning the Court reached its decision remains a matter of conjecture. The Court recognised that the Deneufville were in bankruptcy. It may have evaluated the effects of the attachment on the basis of Dutch law, or it may have construed the provision in the statute of 1623 as expressing a general principle of law, applicable irrespective of whether bankrupty was declared in England or abroad.[32]

The Dutch trustees in bankruptcy had power under Dutch law to claim assets of the estate located abroad. The note in Wallis' *Reports* does not reveal upon what theory the Court recognised that power. According to Lord Loughborough,[33] who had been counsel in *Solomons* v. *Ross*, the case was decided upon the principle 'that the assignment of the bankrupt's effects to the curators of Desolate Estates in Holland was an assignment for valuable consideration, and therefore acknowledged in this country, agreeable to *Captain Wilson's Case* [34] in the House of Lords'. A variety of other

rural estate are prerequisites : Bankruptcy Code, ss. 71, 238. For the English law, see Bankruptcy Act, 1914, ss. 1 (2), 4 (1) (*d*).

30 21 Jac. 1, c. 19, s. 9. 2 Bl. Comm. *486. A. Cullen, *Principles of the Bankrupt Law* (1800), at p. 242.

31 In *Gailbraith* v. *Grimshaw*, [1910] A.C. 508, the House of Lords held for the attaching creditor in a case where goods had been attached in England shortly before bankruptcy was declared in Scotland, and where the attachment would have been void under Scottish law. (The foreign trustee in bankruptcy was said to be 'sitting between two stools', *eodem*, at p. 510, *per* Lord Loreburn.)

32 Cf. *Wylie* v. *Anderson* (April 5, 1797), in the Lord Mayor's Court, where a foreign attachment followed by a sequestration order in Scotland, was held defeated as being but an incipient lien. J. Locke, *Foreign Attachments* (1853), at p. 36, note (*p*).

33 1 H.Bl. 131.

34 *Captain Wilson's Case* was before the Courts in England and Scotland shortly before *Solomons* v. *Ross*. Wilson had been declared bankrupt in England. Subsequently, Scottish creditors holding English claims attached assets in Scotland. The Court of Session, by a majority decision, decided in favour of the English trustee in bankruptcy claiming the assets. *Bradshow and Ross*,

constructions have been suggested,[35] the prevailing one being that ' the English Courts have consistently applied the doctrine of universality according to which they hold that all movable property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee '.[36] American Courts, too, referring to the ' comity of nations ', have allowed foreign trustees in bankruptcy to sue for assets not attached by local creditors.[37]

The account in Wallis' *Reports* does not indicate that the question of reciprocity has played a part in the decision of *Solomons* v. *Ross*. Lord Loughborough's reference to the *Wilson Case* could imply it. Reciprocity may have been expected from the Dutch Courts. In fact, in South Africa the Courts hold on the basis of Roman-Dutch law, by applying the fiction ' mobilia sequuntur ', that movables wherever situated vest in the trustee in bankruptcy appointed by the Court of the debtor's domicil.[38] It has always been a moot question, however, whether that fiction [39] should apply also to bankruptcy.[40]

While the report does not elucidate on the subject of reciprocity it is explicit on another point. We learn that proof was submitted to the Court that in Dutch bankruptcy proceedings foreign creditors shared equally with domestic creditors. This fact is emphasised in the report. The conclusion can be drawn that Justice Bathurst did not feel bound to give the local assets to the foreign trustees in any circumstance. Guarantee of equal treatment abroad for the English

assignees of Wilson v. *Fairholme*, July 6, 1758, 1 Faculty Collection 200, 1 Kames' Select Decisions 106, Brown's *Supplement to the Dictionary of Decisions*, Vol. V, at p. 283 (Lord Kilkerran), pp. 821, 839 (Lord Monboddo). Cf. 1 H.Bl. 691.

[35] See *Hunter* v. *Potts* (1791), 4 TermRep. 182; *Sill* v. *Worswick* (1791), 1 H.Bl. 665; *Philips* v. *Hunter* (1795), 2 H.Bl. 402. Cf. J. Story, *op. cit.*, ss. 404 ff.

[36] G. C. Cheshire, *Private International Law* (2nd ed. 1938), at p. 478.

[37] *Matter of Accounting of Waite* (1885), 99 N.Y. 433, 448, overruling *Mosselman* v. *Caen* (1861), 34 Barb. 66; *Long* v. *Girdwood* (1892), 150 Pa.St. 413, 420; *Maconchy* v. *Delehanty* (1908), 11 Ariz. 366 (not extended to include local land).

[38] *Howse, Sons & Co.'s Trustee* v. *Howse, Sons & Co.'s Trustees* (1884), 3 S.C. 14; *Ex p. Stegmann*, [1902] T.S. 40. Cf. M. Nathan, *Common Law of South Africa* (1907), Vol. IV, at pp. 2083 ff.; *idem*, *South African Insolvency Law* (4th ed. 1936), at pp. 438 ff.

[39] On ' mobilia sequuntur personam ', see M. Wolff, *Private International Law*. (1945), s. 488.

[40] Joh. Voet, *Ad Pandectas* (1698), l. 20, t. 4, s. 12 (in Berwick's translation, 1902, at p. 395), merely stresses the great inconveniences resulting from concurrent administrations and mentions that within the Dutch States a single bankruptcy jurisdiction was secured by statutory provision and inter-provincial compacts. Cf. also l. 42, t. 7, s. 2; l. 1, t. 4, pt. 2, s. 11, 12. Paul Voet, *De statutis eorumque concursu* (1661), l. 9, t. 2, s. 18.

creditor was a prerequisite. It thus appears that the rule of *Solomons* v. *Ross* is not as rigid as could be deducted from the account in Henry Blackstone's *Reports*.

Does this affect the foundation of the doctrine stating that ' an assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country to whose jurisdiction he is properly subject, is or operates as an assignment of the movables situate in England ' ?[41] It would, unless it is said that the question of equal treatment abroad for the English creditor[42] can always be considered under the concept of public policy.

Application of the doctrine as stated involves other difficulties. Bankruptcy does not operate everywhere as an assignment of the bankrupt's property to the trustee. Whilst such is the case under English[43] and American[44] law, in most of the civil law countries the property remains vested in the debtor, and only the exclusive right to administer it passes to the trustee.[45] This would limit the applicability of the doctrine, if taken literally, for a mere technicality.

All bankruptcy laws provide for a relation back of the effects of the bankruptcy to a time prior to the date of the adjudication. While the range of the relation greatly varies,[46] the principle itself is an integral part of bankruptcy law. In *Gailbraith* v. *Grimshaw*,[47] where the assets had been attached by a local creditor shortly before bankruptcy was declared abroad, the House of Lords has, however, refused to recognise the relation back of the assignment under the foreign law.

When bankruptcy has been declared abroad, and according to the foreign law the bankrupt's property has passed to the trustee, it would seem that the trustee, under the doctrine as

41 Dicey (and Keith), *Conflict of Laws* (5th ed. 1932), r. 124, at p. 498.

42 In *Dulaney* v. *Merry*, [1901] 1 K.B. 536, 539, 540, the question of equality was raised on the basis of the statute of Elizabeth in a matter concerning the effects of a deed of assignment for the benefit of creditors executed abroad.

43 Bankruptcy Act, 1914, s. 18 (1).

44 Bankruptcy Act of 1898, as amended, s. 70 (*a*), 11 U.S.C.A. s. 110 (Supplement 1944). All property passes no matter where it is situated. *Collier on Bankruptcy* (14th ed. 1942), Vol. IV, s. 70.07. *Williams* v. *Rice* (Man.K.B.), [1926] 3 D.L.R. 225. The bankrupt has the duty to ' execute and deliver to his trustee transfers of all his property in foreign countries '. Bankruptcy Act, s. 7 (*a*) (5), 11 U.S.C.A. s. 25 (Supplement 1944). *Collier on Bankruptcy*, Vol. I, s. 7.06.

45 W. Burge, *Commentaries on Colonial and Foreign Law*, Vol. III (1838), at p. 904; M. Wolff, *op. cit.*, *supra*, s. 531; Amos and Walton, *Introduction to French Law* (1935), at p. 362.

46 *E.g.*, to the act of bankruptcy, in English law; to the date of the filing of the petition, in American and Canadian law; to the date from which the debtor ceased to meet his liabilities, in French law.

47 [1910] A.C. 508, *supra*, note 31.

stated, could claim the movables in England even if bankruptcy is subsequently declared in England.[48] It has long been held[49] that the Courts retain the right to adjudge a debtor bankrupt who has already been declared bankrupt abroad. The Courts have exercised the right at their discretion as seemed most advisable in the interest of the creditors.[50] Doubts have been expressed that the foreign trustee has a superior right even if he has been appointed by the Court of the domicil of the debtor.[51]

Solomons v. *Ross* and *Jollet* v. *Deponthieu* are the only cases in which the local assets were attached and a foreign trustee was allowed to collect them. In the other instances where foreign trustees could collect assets[52] these assets were unattached. On the other hand, such permission was not limited to movable property. A foreign trustee in bankruptcy was granted authority to act as a receiver of immovable property situated in England, to sell it, and to deal with the proceeds as trustee in bankruptcy.[53]

The theory of unity of bankruptcy is doubtless no part of English law.[54] One may wonder whether the theory of universality is part of English law. This theory is not needed to explain *Solomons* v. *Ross* and *Jollet* v. *Deponthieu*. In cases where the English Courts can declare bankruptcy it is practically a matter of discretion whether a foreign trustee in bankruptcy can collect local assets. It could be said that the right of discretion is even more desirable when, because of lack of jurisdiction, bankruptcy cannot be declared in England.

The seeming rigidity of the rule of *Solomons* v. *Ross* and *Jollet* v. *Deponthieu* has had an important part in the refusal of the Courts in the United States in following these decisions.

[48] Cf. *Re Reilly, A Bankrupt*, [1942] I.R. 432, 456, *per* Murnaghan, J.

[49] *Ex p. McCulloch* (1880), 14 Ch.D.(C.A.) 716; *Re A Debtor*, [1929] 1 Ch.(C.A.) 362, 370.

[50] Cf. *Ex p. Robinson* (1883), 22 Ch.D.(C.A.) 816, where the debtor had no assets in England and the Court declined to make an adjudication.

[51] *Re Artola Hermanos* (1890), 24 Q.B.D.(C.A.) 640, 646, *per* Lord Coleridge. In that case a firm established in Paris by five brothers of Spanish origin had been declared bankrupt in France. Subsequently a receiving order was made in London where the firm had a branch. France was not shown to be the country of the domicil of the debtor. Cf. W. V. Ball in 30 *International Law Association Reports* : The Hague 1921, Vol. I, at pp. 394 ff., 400, on the subject of domicil and bankruptcy jurisdiction.

[52] *Alivon* v. *Furnival* (1834), 1 Cr.M.&R. 277; *Re Blithman* (1858), L.R. 2 Eq. 23; *Re Davidson* (1873), L.R. 15 Eq. 383; *Re Lawson's Trust*, [1896] 1 Ch. 175; *Re Anderson*, [1911] 1 K.B. 896; *Re Craig* (1916), 86 L.J.Ch. 62; *Re Burke*; *King* v. *Terry* (1919), 54 L.J. 430; *Bergerem* v. *March* (1921), 151 L.T. 264.

[53] *Re Kooperman*, [1928] B.&C.R. 49; [1928] W.N. 101.

[54] G. C. Cheshire, *op. cit.*, *supra*, at p. 473.

According to Story,[55] the objection to the ubiquity of the operation of the bankruptcy laws was based upon the ground that the ubiquity could be prejudicial to the just rights of the American citizen. As was stressed by the Courts,[56] local diligence furnished an effective means for securing admission in distributions abroad. Through it the creditors were spared the trouble and expense which proof of their claims in another, possibly distant, country may incur. It gave the local creditor the benefits of the ' race of diligence ' system.

There have been important developments since the establishment of the American doctrine 150 years ago. At that time, the United States had no bankruptcy law[57] and the local diligence led to a preference which could not be challenged. Under the present Federal Bankruptcy Act, location of assets within the United States is sufficient to give bankruptcy jurisdiction.[58] Attachment liens obtained during the four-month period preceding the filing of the bankruptcy petition are void under the Bankruptcy Act if at the time of the attachment the debtor was insolvent.[59] By means of a bankruptcy declaration in the United States the creditor who attaches after bankruptcy has been declared abroad may therefore lose his preference.

The argument that proof of the claim in a foreign, possibly distant, country may incur trouble and expense is losing much of its importance with shrinking distances. Proof abroad is always necessary when the distribution abroad promises a higher dividend than is attainable by relying on the local assets. Often proof abroad will be less troublesome than engaging in local proceedings which, eventually, may not dispense with the necessity to prove abroad.

The basic argument of the American doctrine, protection against possible disadvantages abroad, remains, however, as cogent as before. Some security device is indispensable. For example, there is no guarantee that the local creditor will be admitted in the bankruptcy abroad with the

[55] J. Story, *op. cit.*, *supra*, s. 410.

[56] See *Blake* v. *Williams* (Mass. 1828), 6 Pick. 286, 313 ff.; *Milne* v. *Moreton* (Pa. 1814), 6 Binn. 353, 375; *Remsen* v. *Holmes* (N.Y. 1822), 20 John. 229, 263, 264.

[57] Before 1898, bankruptcy legislation was in force from 1800 to 1803, 1841 to 1843, 1867 to 1878. See C. Warren, *Bankruptcy in the United States History* (1935).

[58] Bankruptcy Act of 1898, as amended, s. 2 (*a*) (1), 11 U.S.C.A. s. 11 (Supplement 1944). *Collier on Bankruptcy* (14th ed. 1940), Vol. I, s. 2.15.

[59] Bankruptcy Act of 1898, as amended, s. 67 (*a*), 11 U.S.C.A. s. 107 (Supplement 1944). *Collier on Bankruptcy*, Vol. IV, s. 67.07.

same ranking as at home, should the local assets be released unconditionally to the foreign Court. The rules of priority in bankruptcy distributions differ in each country. Tax claims, even when long overdue, have a first priority in some countries.[60] Will the foreign Court admit this priority which may absorb the whole estate even on assets coming from abroad? A wage-earner may have, under the law of the country where he works, a priority for wages earned within four months before the bankruptcy. If, in the foreign country where bankruptcy is declared, the period is limited to three months, will he be allowed to receive there what he would have had in the case of the distribution of the local assets in his country? There is no guarantee[61] as to this, the general rule being that questions of priority are governed by the law of the forum.[62]

Even more important than the differences in the priority system is the fact that foreign and domestic creditors are not treated alike everywhere. Discrimination against creditors from abroad has not entirely disappeared.[63] There are rules, mainly in the law of some Latin-American countries, which in certain circumstances give local creditors a right of priority of payment over creditors from abroad. The Argentine law,[64] for example, provides that in the case of concurrent bankruptcies, *i.e.*, when bankruptcy is declared abroad and in Argentine, the creditors in Argentine must have received payment in full in the Argentine bankruptcy before creditors of the foreign bankruptcy can share in the distribution. This provision,[65] which dates back to 1859 and has been the subject of much criticism,[66]

[60] International Chamber of Commerce, Resolutions of the Xth Congress (1939), Resolution 17. *Annales de droit commercial français, étranger et international, 1939, Supplément No.* 3, at p. 3.

[61] In *Stabb, Preston & Prowse* (1821), 1 Newfoundland Reports 267, the Court protected claims with priority under the Newfoundland statute by attaching conditions to the delivery of the local assets to the English trustee in bankruptcy. Cf. also *Matter of People (Norske Lloyd Ins. Co.)* (1926), 242 N.Y. 148, 168, for attaching conditions.

[62] *Thurnburn* v. *Steward* (1871), L.R. 3 P.C. 478, 513. G. C. Cheshire, *op. cit., supra*, at p. 651. *Restatement, Conflict of Laws* (1934), s. 554.

[63] See K. H. Nadelmann, 'Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?' in 91 *University of Pennsylvania Law Review* (1943), at pp. 601 ff.

[64] Bankruptcy Laws No. 11719 of 1933, s. 7 (previously s. 1382 of the Commercial Code: *Commercial Laws of the World*, Vol. I (1909), at p. 259).

[65] Previously in force in Prussia: Code of Civil Procedure of 1793, Pt. I, Title 50, s. 665. L. Levi, *Commercial Law of the World* (1852), Vol. II, at p. 357. Amended in 1798 in consequence of diplomatic difficulties. *Novum Corpus Constitutionum Prussico-Brandenburgensium*, 1798, at p. 1758.

[66] References in K. H. Nadelmann, *op. cit., supra*, note 62, at p. 613 (note 68), 67–72 Clunet (1945), at p. 71 (note 45).

is in force also in Uruguay [67] and Paraguay [68] and has only recently been introduced in Peru [69] too. In Brazil,[70] priority is given to the local creditors in the case of separate and distinct establishments, *i.e.*, when the debtor has one establishment abroad and one in Brazil. Mexico has introduced a provision in its new bankruptcy law [71] granting priority on the assets in Mexico to creditors of a Mexican branch of a company declared bankrupt abroad. These are some examples of local priority rules. Their existence constitutes a grave international problem.[72]

Assuming that there are no priority problems of any kind, and that the creditor risks no loss of rights if the local assets are turned over to the foreign country, there is still the question whether, in the particular case, one administration is preferable to several from the practical viewpoint. Generally, the answer will be in favour of a single administration.[73] Still, circumstances can arise where several administrations are more advantageous, for example, when the debtor has separate establishments in different countries. It pertains to the Court which has the actual control over the assets to also judge this question of expediency.

In the United States, as elsewhere, the view has gained increasing support that concurrent administrations should be avoided whenever possible.[74] The trend toward a single administration is noticeable particularly in the administration of decedent estates. Though the conception prevails that the representative named in one State of the Union can act as such only within the limits of that State,[75] numerous exceptions have been created by the Legislatures and the Courts.[76] The Restatement of the law of the Conflict of Laws by the American Law

67 Commercial Code, s. 1577.
68 Commercial Code, s. 1383.
69 Bankruptcy Law No. 7566 of 1932, s. 26.
70 Bankruptcy Law No. 5746 of 1929, s. 161 (English edition by the British Chamber of Commerce in Brazil). Cf. *Ex p. Wilson* (1872), L.R. 7 Ch. 490.
71 Bankruptcy Act of December 31, 1942, s. 13 (3). See K. H. Nadelmann, 'Once More : Local Priorities in Bankruptcy', in 38 *American Journal of International Law* (1944), at p. 470.
72 The subject of 'Local Priorities' may well warrant action by the Economic and Social Council of 'The United Nations', under s. 62 of the Charter.
73 Cf. J. Westlake, 'On the International Aspects of Bankrupt Laws', in *Transactions of the National Association for the Promotion of Social Science* : Dublin Conference 1861, at pp. 777 ff.
74 See discussion in H. F. Goodrich, *Handbook on the Conflict of Laws* (2nd ed. 1938), at p. 514.
75 *Restatement, Conflict of Laws* (1934), s. 507.
76 See Goodrich, *op. cit., supra*, at p. 476; B. E. Hopkins, 'Conflict of Laws in Administration of Decedents' Intangibles' in 28 *Iowa Law Review* (1943), at pp. 42 ff., 613 ff.

Institute has sought to emphasise the unity of the estate as a whole, especially when the estate is insolvent.[77] A Uniform Powers of Foreign Representatives Act, drafted in 1944 by the National Conference of Commissioners on Uniform State Laws, gives foreign representatives wide powers.[78] In one particular instance, that of the statutory successor of a corporation, it has been held by the Courts[79] that the statutory successor prevails over local creditors and receivers, a rule which, however, does not preclude that a State may take measures to protect local creditors against possible discrimination abroad.[80] It has been argued[81] that the treatment of statutory successors by the Courts affords an analogy for similar treatment of foreign executors and receivers, that the arguments for recognition of statutory successors apply with much force to these other liquidators, and that the cases do not offer any insuperable objection to that conclusion.

It remains to be seen whether in matters of bankruptcy the Courts in the United States will see their way free to sustain a foreign trustee rather than uphold attachments of local creditors where no local protection is necessary and a second bankruptcy administration would not be in the interest of the local creditors. The cases[82] do not seem to bar the exercise of a discretion, nor does the passage in Story exclude it: 'Besides, national comity requires us to give effect to such assignments only so far as may be done without impairing the remedies, or lessening the securities which our laws provided for our own citizens'.[83]

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. This is as applicable to a rule supporting the foreign trustee in bankruptcy as one favouring local creditors. It makes quite a difference whether the creditor would have to submit to bankruptcy proceedings in a neighbouring country with a similar bankruptcy law, or to proceedings in a remote country

77 *Restatement, Conflict of Laws* (1934), *e.g.*, ss. 501–503 (decedents' estates), 545, 553, 558–560 (receiverships).
78 Handbook 1944, National Conference of Commissioners on Uniform State Laws; 9 *Uniform Laws Annotated* (1945 Supplement).
79 See cases cited by Justice Cardozo in *Clark* v. *Williard* (1934), 292 U.S. 112. Cf. G. Glenn, *Liquidation* (1935), at pp. 410, 854.
80 *Clark* v. *Williard* (1935), 294 U.S. 211, 214, 215.
81 E. E. Cheatham, 'The Statutory Successor, the Receiver and the Executor in Conflict of Laws' in 44 *Columbia Law Review* (1944), at pp. 549 ff.
82 *Supra*, notes 5 and 37.
83 *Op. cit.*, *supra*, s. 414.

which might have a different legal system and dissimilar priority rules. Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

The same has been experienced in the bankruptcy treaty field. All efforts have failed to find a type of treaty suitable for universal application.[84] On the other hand, when two specific countries have tried to find a basis for an arrangement on bankruptcy, such attempts have been successful. More than a score of bi- or multi-lateral treaties have been concluded, most of them between neighbouring States, providing for a single bankruptcy administration under specified rules.[85]

Progress in the treaty field is bound to be slow, and the problems arising in the absence of agreements will bear continued attention. *Solomons* v. *Ross*, expressing the liberal, co-operative attitude without sacrificing anything worthy of protection, will hold its eminent place in the evolution of international bankruptcy law. The note on the case in Wallis' *Reports* concludes: 'And this decree was in every particular complied with, without any complaint of any injustice or illegality in it'.[86] Indeed, from the viewpoint of equity, equality being equity, the creditor Ross had no cause for complaint.

K. H. Nadelmann.

[84] Cf. statement of the British Delegation to the Fifth Conference on Private International Law, The Hague, 1925, *Actes de la 5e Conférence de Droit International Privé de La Haye* (1925), at p. 46; reproduced in K. H. Nadelmann, 'Bankruptcy Treaties', in 93 *University of Pennsylvania Law Review* (1944), 58 ff., at p. 85. Report of the Insolvency Committee, Dr. Burgin, chairman, 37 *International Law Association Reports*: Oxford, 1932, at p. 288.

[85] The more recent treaties, *e.g.*, the Franco-Italian treaty of 1930 and the Scandinavian Bankruptcy Convention of 1933, contain choice of law rules and determine, *e.g.*, what law is to govern priorities and preferences. See K. H. Nadelmann, *op. cit.*, *supra*, note 84.

[86] Wallis-Lyne, *Irish Chancery Reports*, 61, note.

STATUTES

THE present Parliament is passing legislation faster than we can comment on it and of the very considerable number of new Acts that have found their way to the statute-book, space only permits consideration of the following :—

FURNISHED HOUSES (RENT CONTROL) ACT, 1946

THIS Act is designed to stop the racket in furnished lettings to which, of course, the Rent Acts do not apply. Its passing was timely, particularly in view of the much-publicised judgment of Henn Collins J., in *Property Holding Co., Ltd.* v. *Mischeff*, [1946] 1 All E.R. 406, in which he held that the value of certain fitted furniture had to be assessed on present-day prices (why ? Surely it should be assessed on the basis of prices prevailing at the commencement of the lease which might well be considerably less ?), and that if £30 out of a rent of £202 is attributable to such furniture this constitutes ' a substantial portion ' of the rent so as to take the letting outside the protection of the Rent Acts. As a result of this decision the landlords of many blocks of flats found that tenancies that they had thought to be controlled were not controlled at all, and considered an immediate increase in rents—an action from which they were only deterred by the speedy passing of this Act through its remaining stages and by the suggestion of the Minister of Health to local authorities that they should consider exercising his powers of requisitioning.

The main points of the Act are :—

1. It only applies to a district when extended to it by the Minister of Health on representation by, or after consultation with, the local authorities. It is believed that most local authorities in London have already represented that it should be extended to them.

2. When extended to a district a local tribunal (chairman and two members) is set up.

3. Either party (or the local authority) to any letting at a rent which includes payment for the use of furniture or for services may apply to the tribunal which may either approve the contractual rental, or reduce it to such sum as they consider reasonable, or dismiss the application. Approval

may be either for an indefinite or fixed period. They may not increase the rent except in one case, namely, when the rent includes payment for services and the tribunal considers that an increase is proper having regard to the increase since September 3, 1939, in the cost of such services. It should be noted that there is no requirement, similar to that in the Rent Acts, that payment in respect of furniture or services must constitute a substantial portion of the rent, and that 'services' includes the provision of heating, lighting and hot water (*secus* under the Rent Acts, see *Engvall* v. *Ideal Flats*, [1945] 1 All E.R. 230, and *Property Holding Co., Ltd.* v. *Mischeff*, *supra*).

4. If a rent is approved or fixed by the tribunal, it is entered in a public register to be kept by the local authority, and it is then illegal for the landlord to charge more or to levy a fine or premium, *i.e.*, the rent is fixed not only as between the parties but for the purposes of any future letting to which the Act applies. It would appear that on a strict interpretation of this provision a landlord who wishes to relet with increased services or furniture must apply to the tribunal before he can increase the rent.

Any excess rent or any fine or premium paid is recoverable, and the landlord also incurs heavy penalties if proceedings are instituted by the local authority.

5. The landlord, tenant, or local authority may subsequently apply again to the tribunal on the ground that the circumstances have changed, and on such an application the tribunal may also increase the rent (in theory it would seem that they may even increase it to more than the original contractual rent, whether or not it includes payment for services).

6. When a letting has been referred to the tribunal by the tenant or the local authority, notice to quit may not be served by the landlord while the application is pending, or within three months thereafter, unless the tribunal directs that a shorter period shall be substituted for three months.

7. It should be noted that the Act is in some respects more, and in others less, extensive than the Rent Acts. It is more extensive in that it applies irrespective of the rateable value of the house. It is less extensive in that it only applies to the particular districts to which it may be extended, and because it merely enables rents to be controlled but, except to the limited extent referred to in 6 above, does

not afford the tenant security of tenure. If, therefore, the landlord wishes to vent his spleen on the tenants by giving them all notice so soon as the three months have elapsed, the only remedy of the tenants is to persuade the local authority and the Minister to requisition or to hit back at the landlord by applying again to the tribunal and persuading them to show their opinion of the landlord's conduct by reducing the rent still further.

Moreover, the rent is controlled flexibly under the new Act; all depends on what the tribunal consider reasonable and not on an inflexible 'standard rent'.

8. Nor is it true to say that even in the districts to which the Act applies every tenancy is either controlled under the Act or under the Rent Acts. Apart from the obvious exception of unfurnished lettings of houses above the prescribed rateable values, neither control applies to lettings which include payment for board, provided the value of the board forms a substantial proportion of the whole rent. Moreover, neither will protect a tenant on an unfurnished letting who has sub-let the whole house furnished. This exception may have unfortunate and probably unintended consequences, for the sub-tenant may apply to the tribunal to fix the rent under the furnished sub-letting, although the tenant will have no means of controlling the rent which he has to pay the landlord. In such a case the tribunal may be faced with the alternatives of causing hardship to the tenant by fixing the rent to be charged by him, or of causing hardship to the sub-tenant by refusing to do so.

9. Further, a letting may be controlled both under the Act and under the Rent Acts. As indicated above, this would occur where the rent includes payment for furniture or services but where the payment does not constitute a substantial portion of the total rent, or where the services do not constitute attendance within the meaning of the Rent Acts. Normally, a tenant protected by the Rent Acts will not require the additional protection of the Act, but there might be circumstances in which he could persuade the tribunal to reduce the rent below the standard rent, and in such a case he could apparently stay on at the reduced rent without being liable to be ejected at the end of the three months except in the limited circumstances permitted under the Rent Acts.

It may be apparent from the above that the Act shows

signs of haste both in design and draughtsmanship. While it undoubtedly meets a need, it leaves the law of landlord and tenant even more untidy than before, for we now have one system applying to 'unfurnished' lettings and an entirely different system for 'furnished' lettings. It is to be hoped that the whole subject will soon be taken in hand.

L. C. B. G.

CONTROLS DURING THE TRANSITION PERIOD

Supplies and Services (Transitional Powers) Act, 1945
Emergency Laws (Transitional Provisions) Act, 1946

It had for long been evident that when in due course the War came to an end the vast body of controls which the Government exercised under emergency powers during the hostilities would have to be carefully reconsidered. Only persons totally lacking in foresight or understanding thought it would be possible to remove all or most of the wartime restrictions at one stroke without precipitating the gravest economic, social and political dangers. The deplorable consequences which have resulted in the United States from such a policy are a clear indication of what would have occurred in the United Kingdom if a similar misguided attitude had been adopted by the British Parliament and Government.

On VE day (May 8, 1945) there were 687 emergency regulations in force: 342 Defence (General) Regulations and 345 others. The next day 84 of the former and 95 of the latter were withdrawn. On May 28, the day when the Coalition Government resigned, one more Defence Regulation was withdrawn. On September 28, a further batch of 39 Defence (General) Regulations and eleven others were revoked. Thus, 230 emergency regulations, or more than a third of the total number, have been withdrawn. Since VE day one new Defence (General) Regulation and two others have been made. The remaining regulations numbered 460, of which 219 were Defence (General) Regulations and 241 other categories.

The Emergency Powers (Defence) Acts, under which the regulations were made, expired on February 24, 1946. Those Acts have been succeeded by two statutes entitled the Supplies and Services (Transitional Powers) Act, 1945, and the Emergency Laws (Transitional Provisions) Act, 1946. The former is by far the more important. It differs in only two important respects from a similar measure which was

introduced by the Coalition Government on May 10, 1945, but dropped by the Caretaker Government. The Coalition Bill was to last for two years only whereas the present Act will endure for five years. The other difference will be mentioned later.

The gist of the Supplies and Services Act is that it enables certain Defence Regulations to be continued in force by Order in Council if it appears to His Majesty to be necessary or expedient to do so in order to secure the fulfilment of specified purposes. These purposes are declared by section 1 (1) to be those of so maintaining, controlling and regulating supplies and services as to achieve one of the following objects:—

(a) to secure a sufficiency of those supplies and services which are essential to the well-being of the community or their equitable distribution or their availability at fair prices; or

(b) to facilitate the demobilisation and resettlement of persons and to secure the orderly disposal of surplus material; or

(c) to facilitate the readjustment of industry and commerce to the requirements of the community in time of peace; or

(d) to assist the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of war.

Item (b) is obviously the simplest and (as a critic would say) the most 'harmless' of the four objects. It is confined to assisting men and women coming out of the Forces and liquidating the vast accumulation of stores acquired by the Government during the war. Item (c), aims at reconverting industry and commerce from military to civil needs; but 'the requirements of the community in time of peace' is a matter on which widely differing views are held. Indeed, the last General Election was a prolonged debate on this very question. The Act gives no indication of what the nation's peacetime requirements are or are deemed to be, nor is there any attempt to relate the expression to pre-War conceptions, standards or practices. The Government is thus at liberty within wide limits to interpret the phrase in accordance with their own political philosophy.

Item (a) offers even greater opportunities to Ministers to exercise the permitted controls to attain ends which formed

no part of national policy before the war. If for example, the Government desires to achieve what the Webbs called ' planned production for community consumption ', it would not be difficult to argue that this is authorised by objective (a).

Item (d) brings us again to less controversial ground, since it is clearly intended to enable the Government to render first aid to the countries which are suffering severely from the effects of the war.

The purposes for which Defence Regulations could be made were much wider, for they included public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and the maintenance of supplies and services essential to the life of the community. But whereas the Emergency Powers (Defence) Acts spoke only of the *maintenance* of supplies and services, the new Act refers to *maintenance, control and regulation.* Furthermore, while the wartime legislation was confined to the provision of supplies and services essential to the life of the community, the present Act extends to those which are essential to the well-being of the nation as well as to various other purposes. Many comforts, luxuries and amenities are necessary for well-being but are not essential to life. Hence, while the new Act is far less comprehensive than the Emergency Powers Acts, it is much wider in scope so far as supplies and services are concerned.

The Supplies and Services Act applies only to Defence Regulations in Parts III or IV of the Defence (General) Regulations in force at the date when the Act was passed (December 10, 1945), together with certain other Defence Regulations set out in the First Schedule to the Act. Thus, with one exception, the Act does not confer power to make fresh regulations: it merely enables any of the existing Regulations in Parts III and IV to be applied to the new statutory purposes of the reconstruction period and amendments to be made in any regulation so applied. The exception is in regard to price control, for in this matter the Government could make new regulations until the expiry of the Emergency Powers (Defence) Acts on February 24, 1946, in order to prevent excessively high prices being charged; and such regulations could then be continued under the new Act. It was in this respect that the present Act differs from the Bill introduced by the Coalition Government.

The Home Secretary, in introducing the present measure, said that the economic case for retaining controls rested on

four main arguments: First, the need to restrict or ration clothing, footwear, textiles, furniture, fuel and other commodities in short supply, so as to secure fair distribution. Second, the need to regulate the building industry, so as to prevent prices rocketing and essential structures, such as houses, schools, factories and hospitals, being neglected in favour of luxury building. Third, the need to maintain agricultural production at the highest possible level. (This involves the use of about a dozen Defence Regulations. For example, to ensure that agricultural land is not used for other purposes without the Minister's permission; the suspension of restrictions on the keeping of hens, rabbits and pigs; the destruction of game and pests; the conferring of power on local authorities to cultivate land and to let it for allotments.) Fourth, the need to avoid inflation through the application of the more effective and comprehensive system of price control which the Act authorises.

With this in mind we can glance at the Defence (General) Regulations to which the Act applies. Part III deals with ships and aircraft. These regulations cover a wide variety of subjects, such as the general control of navigation; the engagement and discharge of merchant crews; control of trade by sea; desertion from fishing boats; power to require performance of services in ships; the regulation of agreements for the use or hire of, or carriage of goods in, ships, and similar matters.

Part IV of the Defence (General) Regulations relates to essential supplies and work. It is by far the longest part of any. The regulations which it contains are very numerous, detailed and long. The competent authorities to which they refer comprise the great majority of Government Departments.

It is impossible in a short article to depict the range and extent of these Part IV Regulations. They authorise a competent authority to take possession of land and to use it for any of the authorised purposes, including the working of any minerals; to requisition property other than land (including any ship or aircraft); to require accommodation in a ship or aircraft to be placed at the Government's disposal; to take control of any war production undertaking either individually or as a class; to exercise general control of industry, by which is meant regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distributing, acquisition, use or consumption of articles of any description, and for controlling their selling prices and the charges which

may be made for the hire of such articles. Defence Regulation 55, which contains these powers, is perhaps the most important of all the regulations from the standpoint of controlling the national economy. Part IV Regulations include those relating to the location of industry, liquor licensing, restrictions on the sale of raw milk, public utility undertakings, the control of building operations, and civil engineering works, the control of employment, the avoidance of strikes and lock-outs, and other matters of large importance. They also deal with miscellaneous details such as the certification of electricity meters, provisions for stamping cheques, the modification of medical prescriptions, and the destruction of valueless documents. In addition to these so-called general provisions, there are other Defence Regulations in Part IV classified under Agriculture and Fisheries, Housing, Transport, and Import, Export and Customs powers.

Although Part IV is entitled *Essential Supplies and Work*, the regulations it contains are not by any means confined to those directed to the maintenance of supplies and services essential to the life of the community. Many of them—including the most important ones—were designed also to secure the public safety, the defence of the realm or the efficient prosecution of the war and are expressed in those terms. It is, however, important to note that a Defence Regulation under Part IV which was passed solely in order to speed war production or otherwise to assist the war effort can be continued under the new Act if it furthers the purposes laid down by that statute. Moreover, section 3 of the Supplies and Services (Transitional Powers) Act, 1945, empowers His Majesty by Order in Council to vary any of the Defence Regulations to which the Act applies in such manner as appears to him to be necessary or expedient for any of the purposes of the new Act.

The Defence (General) Regulations which are excluded from being continued under the new Act are those under Part I, which provide for the security of the State; and those coming under Part II, which relate to public safety and order. On the other hand, the First Schedule to the 1945 Act brings within the ambit of the new system all the regulations in force on December 10, 1945, comprised in the special groups of Defence Regulations relating to Bodies Corporate and Trade Unions; to the Encouragement of Exports; to Finance; to Local Government in Scotland; and to the Recovery of Fines

The Defence (General) Regulations in Part V, which deal with general and supplementary matters, such as administration, offences and legal proceedings, are brought within the scope of the 1945 Act only in so far as they apply to any other regulations having effect by virtue of the Act.

It can be seen that the Supplies and Services (Transitional Powers) Act, 1945, is of great importance and interest not only because it makes provision for the transition from war to peace but also because it confers powers of a kind which are necessary, at least in reserve, during a partial transformation of the national economy such as that which the Government is intent on achieving. Furthermore, the powers of the Ministry of Supply are enlarged so as to enable it to buy, manufacture, acquire or otherwise produce, and also to exchange, sell or otherwise dispose of any articles required for the public service, which is now defined to include any of the purposes set out in section 1 of the Act.

I come now to the Emergency Laws (Temporary Provisions) Act, 1946. Its principal purpose is to prolong the life of certain Defence Regulations until the end of 1947 (unless they are withdrawn before then or continued thereafter by an Expiring Laws Continuance Bill). The regulations in question are enumerated in the First Schedule to the Act, subject to a number of exceptions, modifications and limitations there specified. The Schedule contains fifty-one Defence (General) Regulations or parts of them; and also the less important provisions from twenty-eight of the other codes of Defence Regulations. As in the case of the Supplies and Services Act, the statute does not make or authorise the making of new regulations, but only continues some of those which were previously made.

The Act also prolongs the life of certain statutes, such as the Rent of Furnished Houses Control (Scotland) Act, the Sugar Industry Act, 1942, and several others. Further, it makes permanent some amendments to the law which had been effected by Defence Regulations on a temporary basis. Lastly, it repeals three statutes in whole or part.

It was pointed out by Mr. Oliver, the Under Secretary for the Home Office, in the Second Reading debate, that many of the regulations continued by the Act are extensions of liberty rather than a curtailment of it. For instance, Defence Regulation 33 extends from three to twelve months the time within which a birth may be registered, if the parent has moved from

the district owing to the war. Under another regulation, a liquidator called up for military service may delegate his powers to a deputy; and so on. But no doubt Dr. Allen and his school do not wish to have their liberties extended by executive decree. For in the first place, they object to the method; and in the second, it would spoil their argument, into which so much emotion has been injected, that administrative action leads invariably to tyranny.

The powers conferred by these two Acts are very extensive; larger, indeed, than those which have been possessed by any Government in this country in modern times for peaceful purposes. Very extensive use is being made of them, as anyone can see who takes the trouble to look at the vast number of Orders which have already been issued under the Supplies and Services Act. But is this in the least surprising? The country has just emerged from the most severe, dangerous and totalitarian war in its history; it confronts a critically serious domestic and world economic situation; and it has elected a Parliament pledged to far-reaching economic and social changes in the direction of a planned economy and the socialisation of several basic industries. Any one of these factors would justify very substantial emergency powers being conferred on the executive. In conjunction, they make an overwhelming case, on one assumption. That assumption is that the Government will carry out the kind of policy which it is pledged to undertake: that is, a planned conversion from military to civil activities; a planned reconstruction programme; a planned attainment of full employment. Dr. Allen dislikes the policy, but it is the method which he attacks. It is obviously utterly impracticable for Parliament to legislate in detail on all the multitude of matters which are covered by these and other regulations. Even as it is, the House of Commons can scarcely get through its present work. Is it seriously suggested that we should return to the practice of the eighteenth century, when Parliament legislated in detail on practically every individual topic of administrative action?

Of course there are grave dangers inherent in the modern development of delegated legislation. The task of public lawyers is, however, to devise effective safeguards rather than to cry 'Woe, woe!' or to demand the abandonment of an essential instrument of Government.

W. A. Robson.

NOTES OF CASES

LIBELLOUS COMMUNICATIONS BY A FOREIGN STATE OFFICIAL

From the point of view of international law the decision of Henn Collins J. in *Szalatny-Stacho* v. *Fink*, [1946] 1 All E.R. 303 is both interesting and puzzling.

The defendant, the Chief Military Prosecutor in the Czech Army, published documents alleged to be defamatory upon the plaintiff, the then Czech Envoy in Cairo, by sending them to the Military Office of the President of the Czechoslovakian Republic in London. The principal point for decision was whether the communication was entitled to absolute privilege. The learned Judge held that by English law no such privilege could be claimed. On the other hand he found that by Czech law ' this communication could not have founded any action, civil or criminal ', though in view of an admitted excess of the defendant's official duty the plaintiff apparently had by Czech law the remedy ' to call in question the excess by some other form of procedure ' (which he did without success).

If the libel had been published in Czechoslovakia, no action could have been maintained here, because the communication, though actionable in England, would have been justifiable under the *lex loci delicti.* (This, at any rate, seems to have been the conclusion of the learned Judge, though his reference to the existence of ' some other form of procedure ' does not make it quite certain whether by Czech law it was not perhaps actionability only that was excluded while there remained such lack of justifiability as to bring the case within the rule in *Machado* v. *Fontes*, [1897] 2 Q.B. 231.) But the tort was committed in England. At first sight, therefore, English law alone applied, whatever the nationality of the parties, and Czech law was immaterial. How, then, was it possible for the defendant to invoke the protection which Czech law would give him?

Henn Collins J. held that it was the comity of nations, *i.e.* public policy that demanded that ' His Majesty's Courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their own domestic courts would afford. . . . If the comity of nations is ever to be applied, it should surely be applied

where the document in question was published in this country only because the foreign Government, being our allies, were our guests while their unhappy country was occupied by our common enemy '.

This is, therefore, a second case where an English Court invokes public policy not to exclude the application of a foreign law, but to allow foreign law to impose itself to the exclusion of English law which would normally be applicable. The first case was *Lorenzen* v. *Lyddon & Co.*, [1942] 2 K.B. 202, on which see 5 (1942), Mod.L.Rev. 262, and which has been described as introducing ' an entirely new and rather dangerous conception of public policy ' (M. Wolff, *Private International Law*, p. 537).

Henn Collins J. derived support for his decision from the opinion of the Privy Council in *Hart* v. *Grumbach* (1873), L.R. 4 P.C. 439, 465. That was a case where the defendant, a British subject employed by the Emperor of China, had made to the Board of Ministers for Foreign Affairs at Peking a report which, it was alleged, contained a libel upon the plaintiff, also a British subject. Under the Treaty of Tientsin the action came before Her Majesty's Supreme Court for China and Japan and was to be decided according to English law. It was in these circumstances that the Board to whom the defendant appealed said :—

> Considerations of public policy, if at all, arise in this case upon the suggestion that it is contrary to the comity of nations and therefore against the public interests of this country, to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign State to the Government of that State. Their Lordships are not prepared to say that cases may not occur in which effect should not be given to these considerations. If it were shown that by the law and customs of China officers in the service of the Government were absolutely protected in making reports concerning their subordinates, and that it was against the policy of the Emperor to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and therefore our own public policy, having regard to this comity, to allow a subject of the Queen . . . to maintain such an action as the present. But this is not shown.

This case is distinguishable on the ground that the tort was committed in China. Although the Privy Council speaks

of public policy, all that it was necessary to re-affirm was the principle that in respect of an act committed abroad an action for tort lies in this country only if the act is unjustifiable under the *lex loci delicti*. The suggestions made by the Privy Council should be understood in this narrow sense. They are not conclusive in regard to the present case in which the tort was committed in England.

Yet the result reached by Henn Collins J. merits approval. It is merely the reasoning of the learned Judge that raises a doubt, not only because the doctrine of public policy (even if it should be allowed to lead to the application rather than the exclusion of foreign law) should be resorted to most sparingly, but also because it is not easy to define the precise limits of the decision. Henn Collins J. based it on three, and perhaps four, circumstances, *viz.*, the nationality of the parties, the fact of the communication relating to Czech affairs, and the fact that the addressee was a dispossessed Government temporarily established in London. It is not quite certain to what extent he was also influenced by the fact (mentioned in another connexion) that the defendant was 'a State official and acting as such'. What is the decisive element? Nationality and subject-matter would appear to be irrelevant; if a British subject in the employ of the Czech Government had reported about the activities of a British Envoy, he ought to have been allowed the same measure of protection as the defendant; on the other hand a complaint made by Czech civilian refugee to the Czech Government in London about another Czech refugee does not deserve protection.

Many international lawyers would probably justify the decision on the ground that the defendant's act was an Act of State and as such entitled to immunity *ratione materiæ*. But for reasons which have been developed at length in 59 (1943) L.Q.R. 53 *sqq.* this line of approach would be too sweeping to be reconcilable with sound legal doctrine.

The safest ground of decision would appear to be that the communication was made by a Czech official, acting in pursuance of his duties, to his Government which with the consent of His Majesty was established and exercising its functions in London. The consent of His Majesty to a foreign Government exercising its sovereignty in England implies that in all matters of internal administration the foreign Government functions and lives under its own laws: see *Re Amand* (*No.* 2), [1942] 1 All E.R. 236. If, *e.g.*, the

Czech Parliament is allowed to sit in London, it would be inconsistent with such permission to hold that the Speaker who causes a member to be ejected commits trespass under English law. Similarly the defendant kept within the sphere of internal governmental business conducted under the sovereignty and law of Czechoslovakia; the very nature of the assent given by His Majesty to the establishment of the Czech Government in London is such as impliedly to limit the ambit of British law and the power of Great Britain to interfere with what in *McCullock* v. *Maryland* (1819), 4 Wheat. 216 Chief Justice Marshall called the instrumentalities of Government, *i.e.*, those agencies through which a Government immediately and directly exercises its sovereign powers (see the definition in *Metcalf* v. *Mitchell* (1925), 269 U.S. 514).[1, 2]

F. A. Mann.

NULLITY—NON-CONSUMMATION OF MARRIAGE—BIRTH CONTROL

Cowen v. *Cowen*, [1946] P. 36 is a decision of the Court of Appeal of considerable social importance. It decides that if in intercourse throughout the marriage the husband has used contraceptives the marriage has not been consummated. Hence if the wife has not agreed to this practice (except for adequate reasons) she can obtain a decree of nullity, under the Matrimonial Causes Act, 1937, s. 7 (1) (*a*) (i), on the ground that the husband has wilfully refused to consummate the marriage. The Court held that consummation denotes complete sexual intercourse and not, as Pilcher J. had thought, mere penetration. Whether the position would have been the same if the woman had been the one to use contraceptives was not discussed, and some of the words used in considering the nature of complete intercourse make it possible to argue that it would not. On the whole, however, it seems clear that the basis of the decision is that a marriage is not consummated until intercourse has taken place which is

[1] Dr. Kahn-Freund has been good enough to draw the writer's attention to this analogy derived from a constitutional system in which two sovereignties co-exist.

[2] While this note was going through the press, the Court of Appeal affirmed the decision of Henn Collins J. on the ground that the communication was entitled to qualified privilege. At the same time the Court of Appeal disapproved of the reasoning of the learned Judge. The point which, it is submitted, supports the decision of the Court of first instance was not argued before or considered by the Court of Appeal.

capable of leading to the birth of a child. It may, therefore, be said with some confidence that it has now been decided that a marriage may be annulled if either husband or wife has throughout insisted on the use of contraceptives contrary to the wishes of the other spouse.

The decision is a timely reminder that from the point of view of the State the procreation of children remains the basic object of marriage. On the other hand matrimonial causes remain hostile litigation involving comparative innocence on one side and guilt on the other. Hence the decision makes it clear that the marriage cannot be annulled if the petitioner without good reason has acquiesced in the habitual use of contraceptives, despite the fact that from the point of view of the State there would seem to be just as powerful reasons for annulling the barren marriage in this case as in the other. But acquiescence for a limited period and for particular reasons may be justified and not preclude relief; in *Cowen* v. *Cowen* the parties agreed not to have children while they were residing in a tropical country with an inadequate medical service and it was held that this did not prevent the wife from succeeding after the conditions had changed and she wished to bear children. As to what reasons will be accepted as justifying acquiescence, the Court said that 'each case must be dealt with on its own facts in the light of established principle'. Presumably these reasons may be economic as well as geographical, so that an agreement to use contraceptives while their income was less than they reasonably regarded as needed if they were to rear children would not prevent annulment if the petitioner withdrew his or her agreement so soon as that income was attained. Possibly too an agreement not to have children during the War would be treated in the same way.

A further question may be posed. If the marriage cannot be annulled either because it has at some time been consummated by complete intercourse or because both parties have agreed to the use of contraceptives, what is the position if one party now wants a child and the other refuses? As the cases stand at present it seems clear that the mere refusal is not a matrimonial offence on which a claim for relief can be founded; it has been held that a complete denial of sexual intercourse is not desertion and if this is so an insistence on the use of contraceptives clearly cannot be (*Jackson* v. *Jackson*, [1924] P. 19). At the most it would be regarded as conduct conducing, or as preventing the insisting party

from establishing desertion without cause if the other party left him (*Synge* v. *Synge*, [1900] P. 180). But it is difficult to justify these cases in the light of the principle on which *Cowen* v. *Cowen* was decided; if the procreation of children is the basis of marriage it should be possible to dissolve the marriage if one party unreasonably refuses to permit the other to have children, and it would still be open to the Court of Appeal to hold that such conduct constitutes desertion.[1]

In view of the widespread practice of birth control the decision in *Cowen* v. *Cowen* is unquestionably of considerable importance and on social grounds it may be welcomed. On the other hand sufficient has been said to indicate that the present state of the law on this point is not free from anomalies, many of which inevitably flow from an attempt to treat matrimonial causes partly as the intervention of the State on grounds of public policy and partly as the punishment of the guilty party at the instance of the innocent. So far as it goes *Cowen* v. *Cowen* is an example of the victory of the first principle but the latter was not discarded and until it is our Family Law cannot be other than illogical and unsatisfactory.

L. C. B. G.

EXTRATERRITORIAL EFFECT OF STATUTES—RAISING NEW POINTS IN THE COURT OF APPEAL—TORT COMMITTED ABROAD

An interesting but little noticed decision in 1945 was *Yorke* v. *British and Continental Steamship Co., Ltd.*, 77 Ll.L.R. 418 (Liverpool Ass.); 78 Ll.L.R. 181 (C. A.). The facts of the case were simple. When the defendants' steamship *Imber* was moored at Gibraltar, the plaintiff, who was then third officer on the ship, fell down an unfenced hatch and was hurt. He sued the defendants, basing his claim on common law negligence and on breach of the Dock Regulations of 1934, made under the Factory and Workshop Act, 1901. The defendants contended (1) that the Regulations did not apply, (2) that they had not been guilty of negligence, (3) that the plaintiff had been guilty of contributory negligence, and (4) that the doctrine of common employment applied. Stable J. held that Dock Regulation 37 applied and that the defendants had been guilty of a breach of it, that there was evidence of common law negligence, but that it was not

[1] The Court of Appeal have now refused so to hold and have confirmed the position as stated in the text (*Weatherley* v. *W.*, The Times, April 17). Scott L.J. dissented and leave was given to appeal to the House of Lords.

necessary to decide the point, and that there had been no contributory negligence on the part of the plaintiff. The defence of common employment was expressly abandoned by the defendants. Judgment was given for the plaintiff and the defendants appealed. The Court of Appeal held that the Dock Regulations did not apply, that the defendants had been guilty of common law negligence and, affirming Stable J., that there had been no contributory negligence. The appellants sought to raise the question of common employment which they had abandoned in the Court of first instance; this, however, was not admitted by the Court and the appeal was dismissed.

The case gives rise to several interesting points, first of all that of the applicability of the Dock Regulations outside the United Kingdom. Scott L.J. said in his judgment that the point had been considered in many cases, and he referred to *R.* v. *Jameson*, [1896] 2 Q.B. 425, *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, and *Krzus* v. *Crow's Nest Pass Coal Co.*, [1912] A.C. 590. He pointed out that British legislation does not extend outside the territory or, at any rate, the territorial waters of the United Kingdom, unless Parliament has expressly said so. The legislation in question does not purport to apply outside the jurisdiction of British Courts and the Regulations made in respect of United Kingdom docks and harbours apply to ships only because they happen to be in these ports and harbours. Morton L.J. concurred, relying on a passage of Maxwell's *Interpretation of Statutes*, cited in *Tomalin's Case*. The gist of that passage is that in the absence of a clearly expressed intention or one to be inferred from its language, object, subject matter or history, it is to be presumed that a statute is not to operate outside the territorial limits of the United Kingdom.

The three cases cited have, it is submitted, little value as precedents for *Yorke's Case*. In *Jameson's Case*, the point to be decided was whether the Foreign Enlistment Act applied to a certain colony. Section 2 of the Act provides that it is to extend to all the King's dominions (it must be remembered that this was before the passing of the Statute of Westminster, 1931), and the *ratio decidendi* of that part of the case is simply that this express provision is sufficient to render the Act applicable to the territories indicated in it. *Tomalin's* and *Krzus'* *Cases* turned on the construction of the Workmen's Compensation Acts and

should, therefore, not be binding precedents for the construction of a different statute. The principle laid down in *Maxwell* appears, however, to be sound. Lord Russell C.J.'s *dictum* in *Jameson's Case* that subject to the limits of the British Parliament's power to legislate for a country at all, the area to which a statute is to apply must be gathered from its language and purview is to the same effect. If the Dock Regulations are tested by it, it becomes clear from the title of the Regulations ('Regulations in respect of the loading, etc., goods in or at any dock, etc., and the processes of loading, etc., any ship in any dock, etc.') that their object is to provide for the safety of operations in British ports and not to provide for what Stable J. termed the structure of the ship, apart from such operations.

The defendants, having pleaded common employment, abandoned that defence in the Court of first instance and then sought to raise it again in the Court of Appeal. It would appear from the report that the argument whether or not they were entitled to do so was conducted on the assumption that it was merely a point of law, and the question was naturally treated as analogous to that of raising a point that had not been mentioned before. Scott L.J. referred to the case of *Banbury* v. *Bank of Montreal*, [1918] A.C. 626, pointed out that the principle of that case did not apply and decided that the issue could not be raised. It will be observed that he refers to the point of common employment as an issue and not as a point of law, and indeed it involves both facts and law. The powers of the Court of Appeal in these and similar cases are set out in Order LVIII, r. 4, which provides that the Court of Appeal shall have full discretionary powers to receive further evidence as to questions of fact, but, except upon interlocutory applications and in cases where new matters have occurred after the decision appealed from, this should be done by leave and for special reasons only. With the exception of extreme cases where the discretion is properly exercised in order to prevent a miscarriage of justice, a clear principle seems to apply. It is this. The Court of Appeal or any appellate Court for that matter would normally (although it is always a matter of discretion) do what the Judge of first instance would have done if the matters presented first on appeal had been presented to him, but will not thus act on matters which could have been presented to the jury. In order to understand the suggested

principle one has to distinguish clearly between the functions of Judge and jury and bear in mind that the jury, once gathered, discharges its functions and then disperses for good. (Cf. Amos: 'A Day in Court at Home and Abroad' 2 *Cambridge Law Journal* 340.) The verdict and the matters on which it is based should, therefore, if at all possible, not be interfered with. These considerations do not apply to the work of the Judge who, unlike the jury, does not cease to exist at the end of the case and to whom a case can be remitted. The authorities would seem to bear this out. In the *Banbury Case* the Court of Appeal held that where the Judge of the High Court might have been asked to non-suit the plaintiff or to direct a verdict for the defendant on the grounds of there being no evidence on which a jury could reasonably find for the plaintiff, but had not been asked to do so, they themselves could properly do so where that course had been first suggested on appeal and where they were satisfied that it should have been done by the High Court. In *Dey* v. *Mayo*, [1920] 2 K.B. 346 the decision was that if on raising a point even of law further evidence or further questions might have been available for the jury and that point is raised for the first time on appeal it will be excluded by the Court. In *McDougall* v. *Knight* (1889), 14 App. Cas. 190, the plaintiff did not object to the questions left to the jury, but tried to do so on appeal. It was held that he should not be permitted to introduce matters on appeal which should and could have been submitted to the jury if he had wanted to. In the recent case of *Kwaku Mensa* v. *R.*, [1946] A.C. 83, a prosecution for murder, the point of the possibility of provocation had not been taken in any inferior Court and was raised for the first time in the Privy Council. Their Lordships considered the point and, having come to the conclusion that the jury might have returned a verdict of manslaughter owing to provocation on the evidence given if the question had been left to them, directed a verdict of manslaughter to be substituted. The principle suggested would seem to be a sound one for an additional reason. If on the evidence given a pure point of law arises, but is not argued and, therefore, not considered by the Judge, there seems to be no reason why the Court of Appeal which takes judicial notice of the law should not of its own accord consider such a point and decide accordingly. If that be correct there seems to be even less reason why a pure point of law not argued before

should not be raised by the parties. It may be added that in a case like the present one where the point is not a new one, but one abandond by the party who now seeks to rely on it, the appellate Court should be rather more jealous in exercising their discretion than where the point is a new one.

Du Parcq L.J. said in his judgment that in an action for a tort committed abroad the Statement of Claim ought to allege that the act complained of is wrongful by the law of the country where it is alleged to have been committed. At first sight it is not quite easy to see why this should be so. An act committed abroad is according to *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 actionable in England if (1) it would be actionable as a tort if committed in England, and (2) it is not justifiable by the *lex loci commissi*. The term 'not justifiable' has never been exhaustively defined, but it is generally admitted that it is wider than and includes the term 'actionable' (as a tort). Foreign law is presumed to be the same as English law, and the presumption is, therefore, that, condition (1) *ex hypothesi* being fulfilled, the act complained of is a tort by the *lex loci commissi*. Under Order XIX, r. 25 this presumption need not be pleaded by the plaintiff. Should, which will only happen in a minority of cases, the wrongful act be justifiable by that law, the plaintiff may leave it to the defendant to plead the difference between the two laws; it is the latter who has to prove it in order to escape liability. This view is supported by the fact that in those cases in which the pleadings appear in the reports—*Scott* v. *Seymour* (1862), 1 H. & C. 219 and *Machado* v. *Fontes*, [1897] 2 Q.B. 231—the issue of the justifiability or otherwise of the act by the *lex loci commissi* was first introduced by the defendant. This is also true of *Walpole* v. *Canadian Northern Ry.*, [1923] A.C. 113 and *McMillan* v. *Canadian Northern Ry.*, [1923] A.C. 120. In none of these cases was it suggested that the plaintiff should have pleaded that the act was not justifiable by the *lex loci commissi*. The matter assumes, however, a different complexion if we try to analyse the term 'not justifiable'. Before the decision in *Machado* v. *Fontes* all the decisions dealt with acts which were either tortious or justifiable by the *lex loci commissi*. In *Machado* v. *Fontes* it was held that an act, not actionable as a tort but punishable as a crime by the *lex loci commissi*, was not justifiable within the meaning of the term and that such an act was, therefore, actionable in England as a tort if it was covered by the first

limb of the rule propounded by Willes J. in *Phillips* v. *Eyre*. The next important step is marked by the twin decisions in *Walpole's* and *McMillan's Cases*. Put quite shortly these cases seem to decide that an act through which the defendant has, under the *lex loci commissi*, incurred a liability which, by that law, is not tortious, but imposed by statute independently of any element of tort or crime, is justifiable for the purposes of the rule. It is too early to assess the full significance of these decisions, but it is tentatively suggested that they may mean that an act committed abroad is justifiable unless the defendant has, through that act, incurred a liability which, by the *lex loci commissi* (*vel ommissi*), is either tortious or criminal, or would have incurred such liability but for a purely procedural rule of that law. The authority for the last proviso is *Scott* v. *Seymour*. In that case the defendant pleaded that he could not be sued in tort in the Courts of Naples (the place where the act had taken place) because under Neapolitan law he would have to be prosecuted first (a purely procedural rule). That defence was rejected by the English Court. It must be remembered that this was many years before *Machado* v. *Fontes*; and that the case turned merely on the tortious aspect of the defendant's act.

If this construction be accepted there would seem to be considerable advantages in the course suggested by du Parcq L.J. The plaintiff would then plead that the wrongful act was either tortious or criminal by the *lex loci commissi* (or he would plead these two allegations in the alternative) and the issues would be simplified and clarified. The defendant could then limit his defence to the allegations pleaded by the plaintiff and perhaps plead the rule in *Scott* v. *Seymour*. Were the plaintiff not to raise the issue in the pleadings, he would be understood to plead that the act was tortious by the *lex loci commissi* and the defendant might then plead that the act was not tortious. If the plaintiff then desired to allege that the act was a crime by the *lex loci commissi*, complications would ensue. It is suggested, therefore, that, in order to simplify, shorten and cheapen proceedings, the issues should be split up in the way indicated and pleaded accordingly.

W. A. STEINER.

ANNUITIES PAID 'FREE OF INCOME TAX'

Rule 23 of the All Schedules Rules, Income Tax Act, 1918, which reproduces in almost unaltered form the provisions of section 103, Income Tax Act, 1842, enacts that 'every *agreement* for payment of interest, rent or other annual payment in full without allowing any such deduction (*i.e.*, of income tax—A.F.) shall be void'. It should be added that the agreements are void only as regards the particular stipulation for payment without the deduction of tax—see, among the many cases decided under similar provisions in the Income Tax Act, 1806, *Tinkler* v. *Prentice* (1812), 4 Taunt. 549.

The Courts from an early date have made a sharp distinction between provisions in *wills* for payment of an annuity 'free of income tax' and similar provisions in settlements and other contracts. It was held in *Festing* v. *Taylor* (1862), 3 B. & S. 217, that a devise by a testator of a rentcharge to his widow to be paid 'without any deduction . . . whatever on account of taxes' did not offend against section 103, Income Tax Act, 1842 (cf. *supra*) and so was not void; the omission in section 103 of any reference to 'wills' was held not to be accidental but deliberate and due to the fact that under a will the parties 'take their respective rights from the bounty or forbearance of the testator'. This principle has been repeatedly upheld by the Courts and, in *Inland Revenue* v. *Cook*, [1946] A.C. 1, Lord Maugham observed that it was now far too late to challenge the doctrine. Those interested further in the course of the decisions are referred to the excellent summary in *Dowell's Income Tax Laws* (9th ed.), pp. 762 *et seq.* and to the judgment of the Master of the Rolls in *Re Shewsbury Estates, Ltd.*, [1924] 1 Ch. 135. Whether a will does in fact provide for an annuity to be paid 'free of income tax' is always a matter of construction, *i.e.*, whether the testator has intended to give the annuity and in addition such a sum as would enable the trustees to discharge the income tax due upon the total amount of the annuity and the additional sum, see Swinfen-Eady, L.J., in *Re Saillard*, [1917] 2 Ch. p. 402 and Lord Maugham in *Cook's Case* (*supra*). It should be added that the bequest of an annuity 'free of surtax', as well as of income tax, is good—*Re Reckitt*, [1932] 2 Ch. 144 (C. A.); in such a case the executors must pay that part of the surtax levied on the

whole of the annuitant's income as is proportionately attributable to the annuity.

Where the total income of a taxpayer has to be computed for the purposes of surtax, his assessable income from a 'free of tax annuity' is the amount of the annuity plus income tax at the standard rate on the aggregate of the annuity and the tax—see, for example, *Lord Michelam's Trustees* v. *Inland Revenue* (1930), 144 L.T. 163 (C. A.). Where, in addition to its being 'free of income tax', an annuity is bequeathed 'free of surtax', the 'gross' annuity is deemed to be such an amount as, after deduction of income tax at the standard rate, would leave the actual amount of the annuity devised plus the surtax payable thereon, see *Michelam's Case* (*supra*).

In striking contrast to the principle evolved by the Courts as to 'free of tax' provisions in wills, it has equally long been held that directions in a *settlement* or *contract* for payment of an annual sum 'free of income tax' are absolutely void under the provisions of section 103 or rule 23 (cf. *supra*)—see, among the many cases in the books, *Floyer* v. *Bankes* (1863), 32 L.J.Ch. 610 and *Shrewsbury* v. *Shrewsbury* (1906), 22 T.L.R. 598. This prohibition may, however, be avoided if the wording of the clause exempting the annuity from tax is slightly varied; for example, an agreement to pay 'such a sum as after deduction of income tax shall amount to £x' does not offend against rule 23 and is therefore binding, see *Brooke* v. *Price*, [1917] A.C. 115 and *Re Maclennan*, [1939] 1 Ch. 750, 755.

Mention must be made here of a very important gloss which the Courts have applied in interpreting a bequest of an annuity 'free of income tax', *viz.*, that the testator's intention in such a case must have been that the beneficiary should not obtain more than the actual gross annuity. It was, accordingly, held in *Re Pettit*, [1922] 2 Ch. 765 that where an annuity is given 'free of income tax' under the terms of a will and—as must inevitably be the case—the annuitant is entitled to prefer a claim for repayment of income tax from the Inland Revenue in respect of the personal reliefs and allowances to which he is entitled (sections 17, etc., Finance Act, 1920), then he is liable to hand back to the trustees that proportion of the tax repaid which is equivalent to the ratio which the annuity bears to his total income from all sources; this refund will, of course, go to the residuary estate. The rule in *Pettit's Case* does not, however, apply where a will directs that 'such an

annuity shall be paid as after deduction of tax at the *current rate* amounts to £x'; in such a case the annuitant retains the benefit of any refund made by the Inland Revenue —*Re Jones*, [1933] 1 Ch. 842. Unless such a clause is worded precisely as in *Jones' Case*, *i.e.*, contains the words 'at the *current* (or *standard*) rate', then the rule in *Pettit's Case* will operate. Following the decision of the Court of Appeal in *Maclennan's Case* (*supra*), it was held that the rule in *Pettit's Case* applied to the following types of clauses, *viz.*, 'an annuity of a clear sum after deduction of tax for the time being payable in respect thereof'—*Re Tatham*, [1945] 1 Ch. 35 and 'an annuity *free of income tax* at the current rate for the time being deducted at source'—*Re Williams*, [1945] 1 Ch. 320; the operative words in this latter case were those italicised, the remainder being regarded as mere surplusage; it is upon such 'fine distinction of the language used' that, as Evershed, J., observed in *Tatham's Case*, the operation of the rule in *Pettit's Case* depends. The suggestion of Uthwatt J. in *Williams' Case*, [1945] Ch. p. 322, that the rule in *Pettit's Case* might apply to the assignment of an annuity to a *charity* seems doubtful law since this rule is only operative because the annuitant is entitled to relief from tax by reference to his '*personal* allowances, etc.' and to his 'total income from all sources', see above and Lord Maugham's comments on the rule in *Cook's Case* (*infra*); the title to exemption from tax in the case of a charity depends, however, not on any 'personal' reliefs, etc., but upon the fact that it is a charity—section 37, Income Tax Act, 1918. Finally, it should be added that the rule in *Pettit's Case* applies equally to the non-prohibited clauses re deduction of tax in deeds—*Re Maclennan*, [1939] 1 Ch. 750 (C. A.)—and may only be avoided by the use of the words 'at the standard rate' as in *Jones' Case* (*supra*). Since the judgments in *Re Pettit* and *Re Jones* were expressly, or impliedly, approved by the majority of the Law Lords in *Inland Revenue* v. *Cook*, [1946] A.C. 1, they may be taken as finally expressing the true rule of law as regards 'annuities paid free of income tax'.

The effect of these last-mentioned cases (*Pettit* and *Jones*) upon the annuitant's title to claim repayment of income tax from the Inland Revenue was considered at length by the House of Lords in *Cook's Case* (*supra*). The only income of the annuitant-respondent in this case was an annuity of £100 'free of income tax'; conformably with the rule in *Pettit's Case* she had refunded to the trustees the repayments made

to her in respect of the tax deemed to have been suffered by her upon the annuity. The Crown, however, refused to make any repayment for the year 1939–40. The ostensible reason given was that, because of these refunds, the annuity was not such a sum as after deduction of tax yielded £100, but an amount of £100 plus the tax, if any, that fell *ultimately* to be borne by the annuitant; this additional tax was said to be 'nil' because the respondent's actual total income was below the exemption limit.

By a majority of three to two, the House of Lords rejected the Crown's claim. The *rationes decidendi* given by the majority Law Lords differed, but that of Lord Maugham seems preferable, *viz.*, that, in effect, the respondent's true statutory income was £153 16s. 11d., *i.e.*, the 'gross' sum which, after deduction of tax at the *standard* rate (7s. in the £) would yield the annuity of £100; it was no concern of the Crown that the annuitant had to refund to the trustees the amount of income tax recovered by her. The minority view appears to be that the amount of tax to be added to the actual annuity of £100, *i.e.*, the amount of tax to be paid by the trustees on the annuitant's behalf, should be calculated not by reference to tax at the standard rate but by regard to the amount of tax that would be ultimately borne by the respondent having regard to her total income from all sources, *i.e.*, in the instant case, nothing.

In conclusion, attention may be drawn to the provisions of section 25, Finance Act, 1941, and section 20, Finance (No. 2) Act, 1945, which give relief to the payer of a 'free of tax' annuity in such a way that the tax to be borne by him on behalf of the annuitant shall not exceed the amount that would have been required in the year 1938–39 when the standard rate of tax was 5s. 6d. in the £; these sections, however, apply only to wills executed before September 3, 1939, it being immaterial that the testator may have died subsequent to that date, see *Re Waring*, [1942] Ch. 426 (C. A.).

A. FARNSWORTH.

REVIEWS

WHY CRIME? Some Causes and Remedies from the Psychological Standpoint. By CLAUD MULLINS. (London: Methuen. 1946. ix, 130 pp. 6s. net.)

UNLIKE the same author's *Crime and Psychology*,[1] this book can hardly claim to break any fresh ground. It provides, however, a very useful and stimulating confirmation of what has already been commonly known about certain causal factors of crime. Its greatest value lies in the wealth of practical experience and the profound understanding of the human issues involved which are characteristic of whatever Mr. Mullins writes. The factors which he discusses: Heredity, Parents, Broken Homes, and Illegitimacy, constitute only one sector, though an important one, of the whole field.

There is first heredity. The author complains of 'the almost universal tendency to ignore the hereditary factor in problems of crime'. As far as the theory of crime is concerned this is hardly true. On the contrary, ever since Lombroso perhaps even too much emphasis has been laid on hereditary aspects, although of course in this country, in the U.S.A. and in Soviet Russia the matter has never been so much overdone as in Germany and Italy. It would be easier to agree with Mr. Mullins if his criticism were intended to refer not to the theorist but to the handling of individual cases by criminal Courts. Here it would be justified to say that Courts far too often decide without adequate information on the offender's heredity, and the same applies to many of the penal and reformatory institutions which have to deal with him. An illuminating example of this kind is given in the book (pp. 24—27): the case of P. B., a 'persistent offender', twenty-seven years of age, to whom the author refers as proving the existence of incorrigible criminals. There is not the slightest doubt in the reviewer's mind that such a type does exist, but so far we have hardly reached the stage where we can claim invariably to be able to distinguish between those who would be incorrigible however perfect our methods of diagnosis and treatment may be, and those who are incorrigible only according to our present, very imperfect, methods. 'P. B.'s early years could not be investigated (*i.e.*, by the Juvenile Court before which he first appeared at the age of fourteen)', writes Mr. Mullins, 'since he knew next to nothing about them and the authorities had

[1] Reviewed in 7 MOD.L.REV. 172.

failed to find out more than the probability that he had been illegitimate '. At the age of fourteen he was placed on probation and soon afterwards sent to an Approved School. Surely, it might not have been beyond the wits of men at that stage to obtain some further information on his childhood and, even if the father should have remained an unknown entity, at least on his mother. As things are, it is, however, difficult to see how a case of this kind can be used to prove the significance of heredity. We are in no way opposed to the principal recommendations which the author makes on the strength of his views on the effect of bad heredity, such as detention for life for incorrigibles, sterilisation for the unfit, provided the scientific information required is available. The lack of adequate information of a really scientific nature has been one of the strongest reasons for the failure of Preventive Detention under the Prevention of Crime Act of 1908.

Mr. Mullins is always at his best when dealing with marriage problems. More convincing than ever is his plea for the setting up of some preliminary conciliation procedure in divorce cases where dependent children are involved, and it is certainly true that in the interest of such children nothing should be left undone to prevent ill-considered divorce proceedings. At a time when the technical aspects of divorce procedure are so much in the public mind, these deeper issues should not be overlooked. On the other hand, it might seem going a little too far when the author regards it as at least ' arguable that there should be no full divorce for those who have dependent children '. The chapter on Illegitimacy, too, contains many a useful suggestion which would deserve the careful attention on the part of the legislator.

Hermann Mannheim.

Salmond's Law of Torts. Tenth edition by W. T. S. Stallybrass, D.C.L., Principal of Brasenose College, Oxford; of the Inner Temple, Honorary Bencher and Barrister-at-Law. (London: Sweet & Maxwell, Ltd. 1945. 1 and 632 and (index) 46 pp. 35s. net.)

In his latest edition of *Salmond on Torts*, Dr. Stallybrass has continued his laudable practice of writing a full preface explaining the policy and scope of the new edition. He says: ' The law of torts is perhaps the most rapidly developing branch of our law. It is not surprising, therefore, that this volume should be largely a new book '. The changes in substance between this and the 9th edition have been brought about largely by the developments in the law since 1936; the editor

has still refrained from any widespread re-writing, as distinct from re-arrangement. It is good to read that he has ' cut down some of the long lists of cases in the footnotes which appeared in earlier editions '. The original author was prone to a lengthy citation of authorities which were not always relevant. Thus at p. 276, n. (*k*), it is said that Sir John Salmond seems to have thought that certain cases were irreconcilable with two others ' but it is submitted those cases are not *in pari materia* '. The editor usually treats the author kindly when he disagrees with him but at p. 485, n. (*e*), a sharper tone is heard : ' Salmond also cited *Lygo* v. *Newbold* and *Moffat* v. *Bateman*, the latter of which seems quite irrelevant '. At p. 196, n. (*a*), however, the editor feels able to give his support to the author's opinion that there must be actual damage to justify distress damage feasant ' in spite of the doubts of Williams, Animals, pp. 70–6, and Winfield, p. 361. It seems unlikely that the Courts, with their bias against self-help, will override the authorities which support his statement '.

Dr. Stallybrass has ' preferred modern authorities to old, for the modern authorities refer back to the old and the old cannot refer forward to the new '. Probably many readers will regret the passing of some particular old, familiar case, *e.g.*, Mellish L.J.'s well-known judgment in *Woodley* v. *Metro. District Ry.*, 2 Ex.D. 384 is not to be found. It was referred to with approval once more by Asquith J., in *Dann* v. *Hamilton*, [1939] 1 K.B. 509, and may thus be taken to illustrate Dr. Stallybrass's point. The omission of *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160 as an authority for the proposition that visiting physicians and surgeons are not the servants of the hospital governors is a more serious loss. *Gold* v. *Essex C. C.*, [1942] 2 K.B. 293 is now cited for this proposition. The section on the liability of a hospital for its staff has, naturally, been re-written in the light of this case, which related to a radiographer, but *Evans* v. *Liverpool Corporation* is still the closest actual ruling on the position of visiting physicians and surgeons. One would also have liked to see *Strangways-Lesmere* v. *Clayton*, [1936] 2 K.B. 11 and its twin decision, *Dryden* v. *Surrey C. C.*, [1936] 2 All E.R. 535, mentioned merely for the purpose of condemnation. In holding that a trained nurse when about her professional duties is not a servant of the hospital these cases were impliedly but, unfortunately, not expressly overruled in *Gold* v. *Essex C. C.* If this had been pointed out it would have prevented a possible source of confusion. (*Cf.* the account of the cases in Winfield, *Law of Tort*, 2nd ed. p. 132, n. (*a*), which might leave the impression that there may still be a difference between nurses and radiographers). *Bowater* v. *Rowley Regis*

Corporation, [1944] K.B. 476 on the defence of *volenti non fit injuria* in an action brought by a servant provides two quotations on pp. 35 and 36, but if the older authority of *Yarmouth* v. *France* 19 Q.B.D. 647 on similar facts were to be retained the *Bowater Case* should have been cited alongside it at p. 38. A discussion of a point raised in argument in the *Bowater Case* but not mentioned by the Court of Appeal would have been welcome, *viz.*, what would have been the position if the servant had in fact expressly agreed to take out the dangerous horse in consideration of the master not terminating his engagement by legal notice? In connection with the same defence the 'rescue' cases are still put on the ground of 'duty' though it is said that a 'moral, no less than a legal, duty negatives the reality of the consent' and *Morgan* v. *Aylen*, [1942] 1 All E.R. 489 is cited. But since this decision is it necessary any longer to talk of duty, even moral duty? If there is no family or similar bond between the rescuer and the person in danger it is hardly accurate to speak of 'duty' at all. A recent case which is not sufficiently dealt with is *Thompson* v. *Park*, [1944] K.B. 409; its relation to the decision in *Hurst* v. *Picture Theatres, Ltd.*, should have been noted at p. 249 in connection with n. (*g*).

The voluminous and important literature on the law of torts which has accumulated since 1936 has been duly noted and skilfully summarised. Although Dr. Stallybrass's language of disapproval of a judgment does not descend below 'unsatisfactory', his vocabulary of praise of an article rises to 'instructive' (p. 234, n. (*k*)), 'valuable' (*e.g.*, p. 137, n. (*g*)), 'very able' (p. 490, n. (*i*)), 'very ingenious' (p. 522, n. (*l*)), and 'excellent' (p. 47, n. (*c*)). At p. 339 thirteen writers are cited in a note to *Stanley* v. *Powell*, but those who wish to read Denman J.'s judgment are not assisted, for a reference to the report of the decision nowhere appears. At p. 533 *Nitrophosphate, etc., Manure Co.* v. *London and St. Katherine Docks Co.* also lacks a reference. At p. 23, n. (*g*), it does not seem necessary to quote Williston on the point that a conclusive presumption 'is a rule of law masquerading as a rule of evidence'. Dr. Winfield's *Text-book of the Law of Tort* is sometimes cited for further details on certain points, sometimes agreement is expressed with statements in that book, and sometimes an opposing view is taken. For example, at p. 373, it is said that Dr. Winfield's opinion that written, as distinguished from spoken, words cannot be defended on the ground that they were vulgar abuse 'is inconsistent with the fact that abuse is one thing, defamation another'. This point and the whole defence of vulgar abuse could have been usefully elaborated. As the defence originated in cases of slander not actionable

per se where there was no special damage is it ever available now under the Slander of Women Act, 1891?

Dr. Stallybrass has 'made some considerable changes with a view to a more logical arrangement of the book' and all these changes can be unreservedly welcomed. There is good reason for the editor's confidence that this is the best edition of the work for which he has been responsible. Few, however, would agree with a passage in the Preface in which, referring to a suggestion that he should have produced an independent study of the subject, he says: 'In self-defence I must plead that I could never hope to produce a book of my own comparable in merit with that of Sir John Salmond'.

W. H. D. Winder.

Principles of the Law of Contracts. By the late Sir John Salmond and Professor James Williams. (London: Sweet & Maxwell, Ltd. 1945. xxxvi and 640 pp. 35s. net.)

Three works on the law of Contracts reached us at the beginning of the Long Vacation, and presumably these have, by now, been read and digested by all teachers of law. One was an entirely new work (*Cheshire and Fifoot*); one was the new (19th) edition of *Anson*; and the third (*Salmond and Williams*) is the volume which I have undertaken to review, and which is in part a new work and in part a second edition. Professor Williams, of Sydney University, explains in the Preface the problem with which he was faced and the manner in which he has dealt with it. As all the world knows, Professor Winfield brought out the first edition of Sir John Salmond's manuscript in 1927, leaving the author's *ipsissima verba* intact and adding, in square brackets, his own treatment of topics which Salmond had left unwritten, such as Capacity of Parties and Judicial Remedies. Professor Williams had before him two alternatives, either to repeat Professor Winfield's scheme (adopted again by Professor Winfield in the eleventh edition of Pollock's *Contracts* and by myself in the fourteenth edition of Pollock's *Torts*) of reproducing the text without alteration, or to follow the precedent set by Dr. Stallybrass in successive editions of *Salmond on Torts*, and to rewrite the book, where necessary, in the light of the results of criticism, research and legal decisions since the original work was published. I believe that Professor Winfield and myself adopted the only satisfactory plan in editing Pollock's great text-books, for what the reader wants in each case is the views of Pollock himself. But I am equally convinced that Professor Williams has taken the right course in preparing this second edition of *Salmond on*

Contracts, and that he is fully justified in using a free hand in the revision. Salmond was a great expositor of the law rather than, like Pollock, a great master of it, and a mere verbal reproduction of his views, in a new edition, would have been of little value to students, especially as readers who wish to ascertain his opinions on any contentious matters have only to refer to Professor Winfield's edition.

For the most part, therefore, *Salmond and Williams* is a new contribution to legal literature and is to be appraised as such. A glance at the Table of Cases will show how much fresh matter has been introduced. Under the letter 'A' *Salmond and Winfield* indexed twenty-six cases, six of which do not appear in this edition, but *Salmond and Williams* cite no fewer than sixty-five decisions. *Cheshire and Fifoot* list thirty-nine cases under 'A' (excluding the 'Anons.'), and *Anson* thirty-four. Of course, the practitioner's books give many more references: *Leake* has some 330 cases under the letter 'A', but it is noteworthy that, excluding American and colonial decisions, and those which have been given since Leake's last edition (1931), Professor Williams has made use of as many as fourteen cases which start with this initial letter which are not in Leake's long table. This confirms the impression that one receives on a first reading, that there is much original matter in this edition. Many older authorities of interest have been explored, and by this means fresh light is often thrown upon dark places. *Loftus* v. *Roberts* is a good example of this: it is the best illustration in the reports (and is used as such on p. 195) of the need of certainty in expressing the terms of a contract, and it is constantly cited in practice; yet one looks for it in vain in all ordinary text-books. The actual language used by judges is frequently reproduced in the text; and there are learned footnotes throughout, such as the scholarly examination of *Dies* v. *British, etc., Corporation* (pp. 569—571), where at least 1,500 words are used and there is an elaborate exposition of Tindal C.J.'s judgment in *Fitt* v. *Cassanet*.

Enough has been said to show that this work is an important contribution to the literature upon the law of contracts, and it is pleasant to think that the Antipodes have produced another lawyer, like Sir John Salmond, who has keen insight and deep erudition, and in whose hands, one feels, the development of our law in the most remote of our Dominions is safe.

The work is more suitable for advanced students than for beginners. My own young men, I know, will be greatly alarmed when they realise, on reaching p. 23, that Professor Williams defines a contract as 'either (i) a declaration of the will of a person or the combined declarations of the wills of several persons, creating and defining a non-testamentary

common law obligation or obligations binding the declarant or declarants in favour of the person or persons indicated in that behalf in the declaration or declarations; or (ii) the combined declarations of the wills of several persons, which declarations coincide with each other in point of content and actually or constructively in point of time, and create and define a non-testamentary common law obligation or obligations between the several declarants'. Young men, who like to learn their definitions by heart, will be somewhat perturbed by this ultra-Austinian analysis. What has happened, of course, is that Professor Williams has been led, or misled, by Salmond into forcing the English law of contract into the 'uncomfortable strait-jacket' of jurisprudence. From a purely juristic point of view, no doubt, contract has never been more adequately defined. There is not a loophole. But what has all this to do with the English law of contract? In English law, a contract is an obligation which, before 1852, was enforceable by one of the writs (whether actually or presumptively issued) of Debt, Covenant or Assumpsit. Ought not the ignorant beginner to be told this? Should not his first lesson in the study of contracts be, that no action would lie before 1852, or will lie in 1946, unless one of these remedies would, in those distant years, have been available?

This juristic inception leads inevitably to the exclusion from this work of any adequate treatment of what the jurists call 'quasi-contract'. In other words, here we have what is, in effect, a new text-book on the law of contract, and the reader is nowhere told, except incidentally, about the action for money paid, the action for money had and received, and the action upon an account stated. But, so long as we are the victims—or (*pace* Lord Wright) the beneficiaries—of the dichotomy of the Common Law Procedure Act, 1852, actions to recover debts, whether they are contractual debts or quasi-contractual debts or debts of record, must be treated as part of the English law of contract; and a text-book that does not deal with obligations of this type is not a complete exposition of this branch of the common law.

In passing, it may be noted that both *Cheshire and Fifoot* and the new edition of *Anson* place the proper emphasis upon the historical basis of the law of contract, and Professor Brierly is to be congratulated for having remedied what was an obvious defect in all previous editions of the latter work by adding a valuable section on the early writs.

The only other serious weakness in this new volume is the treatment of the measure of damages, pp. 583–589. Professor Williams, in the teeth of cases like *Bostock* v. *Nicholson*, asserts categorically that the two rules in *Hadley* v. *Baxendale* are really reducible to one rule, being 'two alternative

definitions' of the same measure of damages. He is at liberty to hold this view; but he should surely warn the student that it is not the ordinary interpretation of *Hadley* v. *Baxendale*, and that Professor Winfield, in the first edition, adopted an entirely different (and more orthodox) doctrine. The curious thing is that he cites *Re Hall and Pim*, where the speech of Lord Phillimore is quite at variance with the treatment in the text. And he makes no reference to such leading authorities as Lord Esher in *Hammond* v. *Bussey*, Lord Bowen in *Finlay* v. *Chirney* and in *Cobb* v. *G. W. R.*, and Lord Sumner in *Weld-Blundell* v. *Stephens*.

A few further comments may be added. Professor Williams is inclined to invent a new connotation for such terms as Undertaking, Condition, Promise, Warranty. A writer may, of course, adopt any nomenclature he pleases; but these terms are largely terms of art, and Professor Williams is forced to point out (p. 49, note (*w*)) that his definition of warranty, for instance, is 'both wider and narrower' than that given in the Sale of Goods Act. And it is strange to learn (p. 24) that the expression 'verbal contract' may include a written contract. The unscholarly error of treating the plea of *non est factum* as a defence in an action of assumpsit is inherited (p. 212) from the old Salmond.

Recent articles in legal periodicals are frequently referred to, but two instances where such contributions have been overlooked, and where they would have been helpful, are Mr. Hammelmann's article on *Seddon* v. *N. E. Salt Co.* in 55 L.Q.R. 90 and the note on *Doyle* v. *White City Stadium*, 51 L.Q.R. 270. A perusal of the latter might cause Professor Williams to reconsider his rather startling proposition on p. 301 (though he puts it forward 'with diffidence') that where an infant has contracted in respect of necessaries provided or to be provided for him, and the contract as a whole is for his benefit, he is liable on the contract as fully as an adult would be. In connection with *Phillips* v. *Brooks*, Professor Williams closely (and wisely) follows Professor Goodhart's article in 57 L.Q.R. 228, but he should tell the reader that there are two possibilities as to what North said to Phillips when he entered the shop, and *Lake* v. *Simmons* should be cited.

Like other lawyers, Professor Williams is puzzled by section 56 (1) of the Law of Property Act, 1925, and no doubt others, like myself, have been greatly disconcerted at the proposition which Lord Atkin added to the article on Contract in *Halsbury* (2nd ed., Vol. VII, p. 68), stating that the effect of this section is to enable a person to take the benefit of any covenant respecting any kind of property, although he is not a party to the instrument (cf. also Jenks' *Digest* (2nd ed., Art. 242), a passage for which I must, with Professor Lee, share

the responsibility). But the misconception arises from omitting the all-important word ' named ' in the phrase ' named as a party '. The enactment in question, like section 5 of the Real Property Act, 1845, which it replaces, is simply intended to abolish, both in personal and in real property, the old technical rule (neatly illustrated in *Berkeley* v. *Harding*) that no one can sue *upon an indenture* unless he actually put his seal to the indenture. The person suing must, of course, be entitled to enforce the covenant, though he is not ' named in the indenture ' as a party. He must be a covenantee. The difficulties disappear when it is remembered that at common law a covenantee could always enforce a deed poll against the covenantor; the technical rule only applied to indentures. However, I must not write more about this topic, for I have reason to believe that Dr. Hanbury is about to direct his artillery upon it; flashes from his guns are already scintillating upon the distant horizon.

One of the most interesting chapters is that entitled ' Contracts in Trust for Third Persons ', where many authorities are collected from the equity reports which do not appear in other text-books. *Lister* v. *Stubbs*, however, is not cited; nor is the ' disturbing dictum ' in *de Mattos* v. *Gibson*, nor the decision in the *Strathcona Case*, now condemned by a chorus of disapproval led by Lord Greene in *Clore* v. *Theatrical Properties* and *Greenhalgh* v. *Mallard*. The next edition should deal with these cases.

The following chapter on ' Assignment ', again, is a useful monograph; Professor Williams follows the careful exposition of Atkinson J. in *Holt* v. *Heatherfield Trust, Ltd.* on the vexed question of equitable assignments without consideration.

The book can, without hesitation, be recommended to advanced students.

P. A. Landon.

Recent Trends in English Precedent. By Julius Stone. (Sydney: Associated General Publications Pty. Ltd. London: Stevens. 1945. vi, 76 pp. 10s. 6d.)

Professor Stone has put into a short course of lectures, here republished, part of his forthcoming volume on the Province and Function of Law. Having read them with much pleasure and not a little profit I am glad not to have been kept waiting for the large book, though to that I shall certainly look forward with anticipation.

The theme of the present volume is that perennial topic of discussion among lawyers, law and logic. Although this has occasioned so much dispute, has given rise to many wise sayings, and has formed the subject-matter of numerous chapters,

it is curious how little systematic and substantial work has been done upon it. A comprehensive survey such as this, especially when the subject is so competently handled, is therefore of real value, and cannot fail to meet with a welcome from all students of the functioning of law in society.

Professor Stone precedes his analysis of the recent English case history by short studies of the use of logical methods in the interpretation of the French and German Civil Codes. His object is to discover just how far away from the realities of life a strict adherence to logical method can lead a jurisprudence, and just what fallacies are likely to arise. The answer is that only commonsense and the practical necessities of the situation prevent a completely artificial and theoristic jurisprudence from coming into existence.

Turning to English law, Professor Stone finds that it makes very little difference whether one is on common law ground or civil law ground. The application of strict logical form to the problems of either system leads to similar lop-sided developments and stultifications.

The English judicial achievement is analysed in relation to the needs of social change, and the analysis is conducted in considerable detail and with much power. The difficulty is, of course, not altogether due to logic as such, but to the fact that the average judge is not sufficiently a technical logician to use the weapon of logic to full advantage, nor is he a man of sufficiently wide imagination to appreciate that his mistaken use of logic may lead to serious social consequences, as in the well-known doctrine of common employment. The big figures of course know better, and such names as Holmes and Atkin naturally occur frequently. Lord Wright, too, is often quoted, and with reason, for in some ways he has a more penetrating conception of the purposes fulfilled by a judgment in the building up of a jurisprudence than have the others, profound as was their insight.

To one of the founders of this *Review* it is very gratifying to notice the very substantial use which Professor Stone has made of the material which has appeared therein.

Chorley.

Marriage, Separation and Divorce. By H. B. Grant, m.a., Barrister-at-Law. (London: Stevens. 1946. 130 pp. 3s. 6d. net.)

Mr. Grant has cheerfully undertaken a task which would have daunted most of us, an explanation of the law of marriage and matrimonial causes in no more than 130 small pages and in a manner suitable for the lay reader.

Until I read this book I did not think it could be done. Having read it, I thought that it had been done. Still, it was difficult for a lawyer to pass final judgment. I was sure that Mr. Grant had summarised in masterly fashion the whole range of legal incidents from the contract to marry to the dissolution of the marriage, but only the lay reader himself could say for certain whether it would be interesting and fully intelligible to one unused to legal phraseology. I therefore tried it on my wife. Her initial reluctance to sample one of my 'dry old law books' was speedily overcome and she finished it at a sitting. Her verdict is that it is perfectly intelligible and most interesting throughout and that she has learnt a lot that she thinks she ought to have known (I fear I may have made a rod for my own back).

Mr. Grant owes his success to his felicitous style—racy without being flippant, to his flair for selecting illustrating examples, and above all to his gift of reducing legal rules to their essentials. The result is a book costing no more than the price of a seat at the local cinema, which all may read with advantage. Even the expert will find a study of it profitable if only to show him how the law can and should be explained to the public—a thing which practitioners try to do daily but with varying degrees of success.

It may be thought that exaggerated praise and disproportionate space has been given to a work which admittedly makes no pretensions to original scholarship. I do not agree. Of all branches of the law this touches the public most closely and its principles should be known to all. The means of knowledge are now available. How many books of greater research and learning fulfil as useful a public service?

L. C. B. G.

A Textbook of the English Conflict of Laws. By Clive M. Schmitthoff, ll.m.(lond.), ll.d.(berlin), Barrister-at-Law. (London: Pitman. 1946. xlvi. 455 pp. 35s. net.)

A new textbook on Conflict of Laws is inevitably compared with Dr. Cheshire's masterly treatise and few writers can hope to face this comparison unscathed. It is a tribute to the excellence of Dr. Schmitthoff's book that it stands up to it so well, and where it fails it is largely due to circumstances beyond the author's control. Dr. Cheshire's book is a joy to read and to handle, partly because of its delightfully easy style and partly because of its admirable format and typography. Dr. Schmitthoff cannot quite rival the style (few, if any, legal writers can) and his publishers cannot assist him

as Dr. Cheshire's did in pre-War days. This is a pity, because perhaps the most important feature of a student's textbook is that it should attract its readers. Nevertheless the book is well and clearly written and is a thorough exposition of the law as it stood at the end of the War. It can be wholeheartedly recommended, especially to students with some prior knowledge of the subject, and by present-day standards its price is very reasonable.

This branch of the law is perhaps the least developed of any and widely divergent views can be and are still held by different writers; it is this fact that makes the subject so attractive to academic lawyers and so repellent to the practitioner. Where different views have been expressed Dr. Schmitthoff summarises the various opinions and is not afraid to express his own, which in general are orthodox and sensible, displaying few of the flashes of almost whimsical originality which delighted some, and shocked others, of Dr. Cheshire's readers.

In view of the fluidity of the law, criticism can be no more than the expression of a personal opinion. The chapter with which I personally am least happy is that on the vexed question of the Assignment of Movables which seems to me to paint a very confused picture. Dr. Schmitthoff would doubtless retort, with some justification, that in the present state of the law a confused picture is an accurate picture. But with respect I think his treatment leaves confusion worse confounded than it is. For example, he seems to me to overemphasise the distinction between corporeal and incorporeal movables (if order is to be brought out of chaos, surely this distinction must be minimised?) and although in both cases he favours the *lex situs* as the guiding principle, it is only in the case of incorporeal movables that he appears to recognise and provide for the difficulty that there may be more than one assignment of the same thing each valid by its *lex situs*. But perhaps it is unfair to complain because Dr. Schmitthoff has not blazed a clear trail for us; he is not the first gallant explorer to have got lost here.

I also quarrel with his treatment of Administration of Assets. It is the common fault of academic textbooks that they tend to give an unreal impression of the normally non-contentious Probate practice, and this book is no exception. No doubt it is unimpeachable in theory to say, as in effect the learned author does, that the Probate Court has a complete discretion in granting probate which it will normally exercise in favour of the administrator appointed by the law of the domicil (p. 220). In practice, however, the position is simply that the Probate Registry make a grant as a matter of

course either to the person entitled under English internal law or to the person entitled under the *lex domicilii*. And as for the statement (at p. 225) that the English ancillary administrator should before distributing obtain the directions of the Court, if this means that in the normal case he should not transfer the assets to the foreign principal without a Court order, the highly inconvenient rule suggested is happily not part of the English law or practice.

Nor do I agree with the strictures (at p. 320) on the recent attempts by the Courts to do away with the distinction drawn in *Inverclyde* v. *I.* between void and voidable marriages, and the statement (at pp. 305 and 322) that the nullity decree of a foreign Court of domicil has no effect on a validly celebrated English marriage, is, to say the least, doubtful. Further, the discussion of polygamous marriages must now be read in the light of *Baindail* v. *B.*, [1946] 1 All E.R. 342 which was unfortunately decided too recently for inclusion.

On the other hand, Dr. Schmitthoff's views frequently come like a welcome breath of fresh air; one example among many is at p. 234 where he points out that as the interpretation of wills depends on intention it is futile to enter into discussions on *lex domicilii* at death *versus lex domicilii* at the date of the will.

I cannot do better than conclude with the final sentence of Lord Macmillan's appreciative Foreword: 'I have found the reading of this book an excellent "refresher course" . . . and I commend it as a convenient work for the practitioner to consult and, perhaps especially, as an admirable manual for law students.' As one in much greater need of a 'refresher course', I respectfully concur.

L. C. B. G.

LIBRARY OF CONGRESS: ANGLO-AMERICAN LEGAL BIBILIOGRAPHIES. AN ANNOTATED GUIDE. By WILLIAM L. FRIEND. (Washington: United States Government Printing Office. 1944. pp. xiv, 166. $1.50.)

The first thirty-six pages are a most interesting survey of the history of the efforts of law publishers and lawyers generally to take stock of their professional literature, both in England and America. For the most part they were book-sellers' stock lists, or sometimes guides to students; both classes are well represented in our own day by useful reference works. Scientific legal bibliography has never been very common, but the American contributions are outstanding, and it is good to have Mr. Friend's detailed accounts of the classic work of Wallace on the reporters and Soule on the Year Books.

The work is not confined to legal antiquities, and gives bibliographies (where they exist) of such current subjects as aviation law, the constitutional aspects of the recovery programme, besides regional and personal bibliographies. Most of these did not appear as separate books, and so the compiler has sought his material in the vast wilderness of legal periodicals, bar association proceedings and lists appended to treatises, biographies and the like. A perusal of the 298 titles cannot fail to arouse regrets in English readers that so few of the references are to be found in this country. It would be easy to suggest additions to the list, and some of the details given could well have been spared, likewise many elementary students' lists. Since the work has undertaken to discover bibliographical material contained in other works, it is regrettable that the long and valuable bibliographical sections scattered in Holdsworth's *History* have not been listed; and quite inexplicable that the reference to that work in entry 146 should be to the edition of 1908.

T. F. T. PLUCKNETT.

THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO. By WENDELL C. GORDON. With an Introduction by SAMUEL GUY INMAN. (Washington: American Council on Public Affairs. viii and 201 pp. $2.50 net.)

THIS book is devoted to an exposition of the vicissitudes suffered by Mexico's foreign investors. After a short description of the background of the expropriations Dr. Gordon deals in three chapters with the Mexican Land Reform, its economic development, the municipal laws controlling it and its international aspects. The following six chapters describe the fate of the oil industry, *viz.*, its economic development, its legal status, its international and economic aspects, the confiscatory legislation and the attempts at a settlement of the oil controversy. The remaining chapters deal with the position of the railways, future expropriations, international law and the future of the problem. As the preface explains, 'the domestic, economic, social and legal conditions are used as a background for considering the expropriation of property in its international aspects and with regard to its legality under international law'. Although the presentation of the material is perhaps not altogether inspiring, and although the author does not engage in any profound discussion of the problems, his work is useful for its assembly of extensive factual material, and, objectively written as it is, it merits the attention of those interested in the peculiarities of the Mexican situation.

F. A. MANN.

A Handbook on the Death Duties. By H. Arnold Woolley, Solicitor of the Supreme Court. Fifth Edition. (London: The Solicitors' Law Stationery Society, Ltd. 1945. xxxiv, 271 pp. 21s. net.)

The field covered by the Death Duties is so extensive and the subject of so abstruse and involved a nature that a detailed analysis of this excellent work would hardly be in place in this *Review*. Though Mr. Woolley's book is specially written for the busy practitioner who does not wish to refer to 'Dymond' or 'Green', yet it contains so readable and clear an account of the main constituents of the duties that it is an ideal work for the law student who is commencing his study of this recondite subject. The fact that the work has run to five editions, of which three are war-time, is proof enough of its accuracy and comprehensiveness; there are, however, some features which deserve special consideration.

The author's method of illustrating his points by practical examples throughout the text is to be especially commended; the law student, in particular, will appreciate the final chapter (XVIII) which sets out in considerable detail the duties arising in connection with eight specimen estates of varying magnitude and complexity, together with useful notes as to the accountable parties and the differing rates of duty. Both the Legislature and the Courts have, of recent years, severely restricted opportunities for 'legal evasion' of the death duties, but Mr. Woolley's experience as a practising solicitor has enabled him to devote two very interesting and useful chapters to 'Mitigating the Duties' (XVI) and 'Duty-saving Testamentary Dispositions' (XVII). Those whose duty it is to advise testators will, however, do well to heed the author's admonition that his remarks in these chapters 'constitute as much a warning against what had better not be attempted as a lead to what can properly be done', especially having regard to the recent tendency of Parliament to legislate *retrospectively* against 'tax-dodging' schemes. The attitude of the Courts towards tax evasion has changed considerably in the last half century, contrast Chitty L.J.'s remarks in *Att.-Gen.* v. *Beech*, [1898] 2 Q.B. 147, 157: 'The case falls within the Act or its does not. There is no such thing as evasion. . . .' with those of Lord Simon L.C. in *Latilla* v. *Inland Revenue*, [1943] A.C. 377, quoted in full in the note on this case at 6 Mod.L.Rev. 244. An attack in force upon evasion of the duties was launched by the Finance Acts of 1939 and 1940, and a most useful summary of their effect is contained in Chapter XV. Mr. Woolley comes to the conclusion that, as a result of their provisions, no substantial saving of the duties can be effected by forming a

'controlled' company, and suggests that better results can be obtained by forming partnerships.

The chapter on Domicil (XIII) is on the slight side though it contains a useful note on the 'Proper Law' of Settlements (pp. 144 and 170). The definition of 'ordinarily resident' as 'the place where a man means to spend most of his time and have his principal home'—*Ex p. Cunningham* (1884), 13 Q.B.D. 478—does not accord with the developed modern law of residence. Recent decisions of the House of Lords—cf. *Inland Revenue* v. *Lysaght*, [1928] A.C. 234, and *Levene* v. *Inland Revenue*, [1928] A.C. 217, show that the term 'ordinarily resident' has no special technical meaning, and that it may best be defined as residence which is habitual and part of the regular order of a man's life.

The practitioner's attention is specially directed to that portion of Chapter VII which deals with the incidence of colonial and foreign duties and the consequential possibility of double taxation. At pp. 80–4 will be found a most useful statement on the position of shares in South African companies which have duplicate London Share Registers, and also a reasoned criticism of the decision on this point in *Farrar's Estate* v. *C.I.R.* (S.A.L.R. [1926] T.P.D. 501).

Mr. Woolley comments upon the expense attending executors in contest rulings of the Estate Duty Office through the Courts and suggests that, where the taxpayer succeeds in the Court of first instance, the Crown should pay the costs of both sides in any appeal to a higher Court; there is, perhaps, more to be said for this view than a similar one of Dr. C. K. Allen in his recent book *Law and Orders*, where he suggests that revenue appeals should be confined to a Divisional Court of three judges sitting permanently in session.

The Index is very adequate and has been carefully compiled; a useful feature is the 'Summary of Recent Statutes' (1925–1944) which will be found at pp. xxxi–xxxiv. In conclusion it can safely be said that not only will the practising lawyer find the work most useful for quick reference and as respects the practical application of the duties, but the law student, too, can ask for no better introduction to the subject of the Death Duties; in fact, the fourth edition of the work was the prescribed book for the Law Society's Final Examination.

A. FARNSWORTH.

IMPOSSIBILITY OF PERFORMANCE IN CONTRACT. By R. GOTTSCHALK. (London: Stevens. 1944. xvi, 146 pp. (with index), plus 28 pp. supplement. 10s.)

THIS is a reprint of the first edition of this book, with the addition of a supplement in which the recent decisions are

digested from the date of the original appearance of the book in 1938 down to 1944. Among these is a two-page précis of the Frustrated Contracts Act of 1943.

This book was reviewed by Miss Jaffee in 3 Mod.L.Rev. at p. 172. At the time of its appearance the literature on the subject in this country was confined to articles in periodicals. Since then, however, we have had Sir Arnold McNair's excellent volume on *Legal Effects of War* (see 8 Mod.L.Rev. 86), Mr. George Webber's substantial *Effect of War on Contract* (see 3 Mod.L.Rev. p. 233), and others. Dr. Gottschalk's book will not stand comparison with these in its analysis of the English decisions, nor in its interpretation of the English doctrine. Its main value lies in its interesting comparative treatment of the Roman law of cases and in its references to articles from American legal journals which are extensively quoted, as are the relevant passages from the Restatement.

Some of the later cases, especially the *Fibrosa Case*, [1943] A.C. 32, have thrown much light on the subject, and the Frustrated Contracts Act, 1943, has, of course, completely revolutionised important aspects of it. The reviewer finds it difficult to commend an author who only deals with such matters by way of supplement. Substantial portions of the main text should clearly have been rewritten. Until this has been done the book cannot be regarded as a satisfactory introduction to this difficult subject.

Chorley.